1991

Jim Hunsaker, individually and on behalf of the deceased Maurine F. Hunsaker, and Betty Sudweeks on behalf of Matt Hunsaker, Nicholas Hunsaker, and Dana Hunsaker, minor children of Jim and Maurine F. Hunsaker v. State of Utah, a body politic, Gary Deland as director of the Utah State Department of Corrections, The Utah State Department of Corrections, The Utah State Board of Pardons and Parole, Myron March as the director of the Utah State Department of Adult Probation and Parole, Ray Wall, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, Kent Jones and Joe Smout, as

Supervisors of John Shepherd of the Utah State Department of Adult Probation and Parole, John Shepherd, in his capacity as parole officer, Utah State Department of Adult Probation and Parole, Ralph Leroy Menzies, Gas-A-Mat Oil Corp of Colarado, a Colorado corporation and John Does I-V : Brief of Appellant

Utah Supreme Court

Debra Moore; Assistant Attorney General; R. Paul Van Dam; Attorney General; Attorneys for State Appellees; Gary L. Johnson; Richards, Brandt, Miller, & Nelson; Attorneys for Appellee Gas-a-Mat . P. Gary Ferrero; Attorney for Appellants.

IN THE UTAH SUPREME COURT

JIM HUNSAKER, individually and on behalf of the deceased MAURINE F. HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER,and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER, Plaintiffs/Appellants, vs. STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as Supervisors of John Shepherd of the Utah State Department of Adult Probation and Parole, JOHN SHEPHERD, in his capacity as parole officer, UTAH STATE DEPARTMENT OF ADULT PROBATION AND PAROLE, RALPH LEROY MENZIES, GAS-A-MAT OIL CORP OF COLORADO, a Colorado corporation and JOHN DOES I-V, Defendants/Appellees.	UTAH ME COUR BRIEF .S9 DOCKET NO. 910366 APPELLATE COURT NO. 910366

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BRIEF OF APPELLANTS

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Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Richard H. Moffat, presiding.
Argument Priority 16

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JURISDICTION

The Utah Supreme Court has original jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(3)(j). This is an appeal from orders in a civil matter, from the Third Judicial District Court in and for Salt Lake County, State of Utah, which were certified as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Therefore, jurisdiction is proper.

STATEMENT OF THE ISSUES

A. Gas-A-Mat Oil Corporation of Colorado

The Court granted Defendant/Appellee's Motion to Dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Plaintiffs/Appellants contend that the dual capacity doctrine supports the position that an employer may act in dual roles. In reviewing a court's dismissal of a complaint pursuant to Rule 12(b)(6), the standard of review is that the Appellate Court must review the case in the light most favorable to the party whose complaint was dismissed. Since there are no findings of fact, the Appellate Court may substitute its judgment for that of the Trial Court. See Draper Bank & Trust Co. v. Lawson, 675 P.2D 1174 (Utah 1983) and Ferree v. State of Utah, 784 P.2d 149 (Utah 1989).

B. State Defendants/Appellees:

The issue presented is what duty is created on the part of a state agency to members of the public in general. The Court has indicated that a duty may be created either by a

special relationship between the State and the victim or by a special relationship between the State and the third-party actor. The Appellants assert that the third-party actor was being supervised by the State Defendants/Appellees, thereby creating a duty to regulate foreseeable conduct against foreseeable (if not readily identifiable) persons. Plaintiffs/Appellants' claims against the State were denied on a Motion for Summary Judgment, therefore, the Court must review the facts in the light most favorable to the Plaintiffs/Appellants and determine if any material issues of fact exist. In that no findings of facts have been entered, the Appellate Court may substitute its judgment for that of the Trial Court in that these are questions of law. See Ferree, supra, Lawson, supra and Bushnell Real Estate, Inc. v. Nielson, 672 P.2D 746 (1983).

DETERMINATIVE AUTHORITY

There are no determinative statutes, rules or cases in this appeal.

STATEMENT OF THE CASE

A. Nature of the Case

This action was filed by the survivors of the decedent, Maurine Hunsaker against an employer, the Appellee Gas-A-Mat Oil Corporation of Colorado (hereinafter "Gas-A-Mat") and against the State of Utah, Department of Corrections and its various representatives (hereinafter "State Defendants"). Mrs. Hunsaker was abducted and murdered by a parolee, Ralph L. Menzies. At the time Mrs. Hunsaker was abducted, she was

employed by Gas-A-Mat. Appellants contend that Gas-A-Mat was acting in a dual capacity in its employment of Maurine Hunsaker and as a provider of security for its station locations.

On the night she was abducted, Mrs. Hunsaker was working at Gas-A-Mat's 3995 West 4700 South, Salt Lake County, Utah station. At that station, Gas-A-Mat had indicated, through the posting of signs, that security, "electronic surveillance", was being provided. This provision of security creates the dual capacity in which Gas-A-Mat was acting. While the Utah Supreme Court has not accepted the concept of dual capacity, it has not rejected it either. The Appellants contend that this fact situation is what is contemplated in the doctrine of duel capacity.

While it is true that generally an employer has an obligation to provide a safe working environment, that duty doesn't usually extend to the providing of security from attacks by third parties. In this case, Gas-A-Mat stepped out if its role as employer and stepped into the role of a provider of security. The contemplation of a "safe working environment" is one where an employee would be safe from on-the-job accidents and other usual hazards of employment. Attacks by third parties are not generally considered to be hazards of employment, even at convenient stores/gas stations.

In posting the premises as being under electronic surveillance, Gas-A-Mat created the appearance of a secured location. Maurine Hunsaker and the Appellants relied on Gas-A-

Mat's representations that security was in fact being provided. Therefore, their reliance and subsequent actions on that reliance created the duty to protect Maurine Hunsaker from foreseeable harm. In that this site had been robbed on previous occasions, the actions taken by Mr. Menzies against Mrs. Hunsaker were clearly foreseeable on the part of Gas-A-Mat. Gas-A-Mat in its role as a provider of security failed to meet its duty of due care.

Mr. Menzies was on parole at the time of Mrs. Hunsaker's death and Appellants also assert that the parole was negligently supervised by the State Defendants/Appellees (all State Defendants except the Board of Pardons). Appellants assert that, while on parole, Menzies committed numerous acts which were considered to be violations of parole and yet no incident reports or reports of parole violations were ever filed with the Board of Pardons. This is contradictory to the then existing policies and procedures promulgated by the Department of Corrections, Division of Adult Probation and Parole.

Appellants also assert that the supervising parole officer, John Shepherd, failed to properly monitor the parole of the Defendant Menzies and failed to thoroughly investigate allegations of violations made against Menzies. This also is a violation of the policies and procedures of the Department of Corrections, Division of Adult Probation and Parole.

Appellants assert that as a direct result of the State Defendants/Appellees' failure to properly supervise

Menzies' activities while on parole, he was able to abduct and murder the decedent, Maurine Hunsaker. Appellants assert that the State Defendants/Appellees, because of their relationship to the Defendant Menzies, had a duty to foreseeable, if not readily identifiable, members of the public to protect them from the actions of Ralph L. Menzies. The State Defendants/Appellees were aware of Menzies' long violent history, his prison records, including his juvenile record, and in all other ways were well acquainted with the danger this individual posed to society if not properly supervised. Even with this information, the State Defendants/Appellees failed to properly supervise the parole.

Appellants also assert that the State Defendants/Appellees are not immune from action in this matter in that their actions were not discretionary. The Board of Pardons set specific conditions and terms of parole and it is the obligation and duty of Adult Probation and Parole to enforce the terms and conditions. Appellants allege that the enforcement of these terms and conditions is not discretionary, but is ministerial. In addition, complying with the policies set by Adult Probation and Parole, specifically those policies requiring incident reports and reports of possible parole violations, are not discretionary, but are ministerial in nature. Therefore, the failure on the part of the parole officer and his supervisors to file incident reports and reports of parole violations were ministerial acts and are not protected under the governmental immunity statutes. Appellants assert that these actions on the

part of the State Defendants/Appellees proximately caused the death of Maurine Hunsaker and therefore those Defendants are liable to the Appellants for damages.

B. Course of Proceedings

The Complaint in this matter was filed on or about June 16, 1987. Answers were filed by all Defendants and the case proceeded through discovery. In early 1988, a Motion to Dismiss was heard by the trial court as to the Defendant/Appellee Gas-A-Mat Oil Corporation of Colorado. This Motion was brought under Rule 12(b)(6) of the Utah Rules of Civil Procedure and the Motion was granted. At that time, Plaintiffs/Appellants made an oral motion for certification pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, but the trial court denied the motion.

Plaintiffs/Appellants continued discovery as to the State Defendants/Appellees and, ultimately, Motions for Summary Judgment were filed by all parties, with the exception of Ralph L. Menzies. These motions were heard by the trial court and further memoranda was requested. Supplemental memorandums were filed and the matter was heard by the trial court. On or about April 5, 1991, the trial court ruled in favor of the State Defendants/Appellees and entered summary judgment against the Appellants.

C. Disposition by Trial Court

The Trial Court initially dismissed Plaintiff's claims against Appellee Gas-A-Mat in its Order of Dismissal dated February 1, 1988 (Attachment "A"). The issues as to the

remaining Defendants, with the exception of Ralph Leroy Menzies, were resolved by the trial court granting summary judgment, Minute Entry dated April 5, 1991 (Attachment "B"). An Order followed the Court's Minute Entry which was objected to by Appellants. An amended Order granting summary judgment was entered by the Court on or about May 15, 1991 (Attachment "C"). In that this Order did not dispose of all issues before the Court, an Order pursuant to Rule 54(b) of the Utah Rules of Civil Procedure was requested. Said Order, entering final judgment as to all Defendants/Appellees, with the exception of Ralph Leroy Menzies, was entered on May 29, 1991 (Attachment "D"). Subsequently, the Plaintiffs/Appellants sought and obtained an Order enlarging time to file a notice of appeal and said Order was entered June 27, 1991 (Attachment "E"). Plaintiffs/Appellants then commenced this Appeal by filing their Notice of Appeal on July 26, 1991 (Attachment "F").

STATEMENT OF RELEVANT FACTS

I.

GAS-A-MAT

a. Defendant Menzies was released from incarceration on the 9th day of October, 1984 under certain terms and conditions of parole (Plaintiffs' Complaint, hereinafter "PC", ¶26, Appellants' Addendum, hereinafter "Applts' Add.", p. 75).

b. The decedent Maurine Hunsaker was employed by Defendant/Appellee Gas-A-Mat Oil Corp of Colorado (hereinafter

"Gas-A-Mat") on the 22d day of February, 1986. She was employed by Gas-A-Mat as a cashier at its station located at 3995 West 4700 South, Salt Lake County, Utah (PC ¶ 35, Applts' Add. p. 76).

c. Decedent's duties consisted primarily of monitoring the customers at said Gas-A-Mat location and receiving payment from them for products purchased (PC ¶36, Applts' Add. pp. 76-77).

d. At all times material hereto, Defendant/Appellee Gas-A-Mat served in two capacities in its retail gasoline operation (PC ¶37, Applts' Add. p. 77).

e. Defendant/Appellee Gas-A-Mat served as a retailer of gasoline products and, in that capacity, was the employer of Maurine Hunsaker (PC ¶ 38, Applts' Add. p. 77).

f. As the employer of Maurine Hunsaker, Gas-A-Mat had duties and obligations attendant between all employers and employees (PC ¶ 39, Applts' Add. p. 77).

g. These duties included, but were not limited to: payments for services rendered, collection of withholding and social security taxes, provision of a safe work place (with safe meaning safe from industrial accidents) and other obligations and requirements. Defendant/Appellee Gas-A-Mat, as Maurine Hunsaker's employer, generally fulfilled these duties and obligations (PC ¶40, Applts' Add. p. 77).

h. However, Gas-A-Mat undertook further obligations and began serving in an additional capacity other than that of retail gasoline sales (PC ¶41, Applts' Add. p. 77).

i. Gas-A-Mat undertook to provide security from violent acts or theft by third persons (PC ¶42, Applts' Add. p. 77).

j. These acts consisted of the provision of cashiers booths, signs alerting individuals that the premises were secured (although they were not) and other measures to protect the security of any individual entering onto the premises including employees of Gas-A-Mat's retail gasoline sales operation. (For the purposes of distinguishing the two capacities, the retail sales will be referred to as "Gas-A-Mat Sales" and the security operation will be referred to as "Gas-A-Mat Security") (PC ¶43, Applts' Add. p. 77-78).

k. Gas-A-Mat Security was aware that the Gas-A-Mat Sales installations were particularly subject to armed theft (PC ¶44, Applts' Add. p. 78).

l. This was due to the nature of their business and the fact that convenience outlets of all kinds are noted as high risk operations (PC ¶45, Applts' Add. p. 78).

m. The retail sales location at which Maurine Hunsaker had been employed had been robbed at least twice previous to the abduction of Maurine Hunsaker on February 22d, 1986 (PC ¶46, Applts' Add. p. 78).

n. Due to the high risk nature of the Gas-A-Mat Sales operation, Gas-A-Mat Security had a duty to inform Gas-A-Mat Sales as to improvements to be made in security at said installation (PC ¶47, Applts' Add. p. 78).

o. Some of these recommendations should have been a locked, bullet-resistant cashier's booth where employees could be protected from armed assailants, employee training to prevent situations whereby innocent third parties could be injured as a result of an attempted theft or robbery, an adequate alarm system whereby an employee could signal the local authorities or Gas-A-Mat Security to assist them in a robbery or theft situation, reasonable shift work and times so that employees would not be left alone for long periods of time, and adequate surveillance on a random basis either by Gas-A-Mat Security or local police officers (PC ¶48, Applts' Add. p. 78-79).

p. Gas-A-Mat Security failed to provide these recommendations to Gas-A-Mat Sales and as a result, none of said recommendations were implemented (PC ¶49, Applts' Add. p. 79).

q. The design of the cashier's booth was faulty in that it required an employee to leave the booth to obtain payment from the customers. It also had no bullet resistant features (PC ¶50, Applts' Add. p. 79).

r. Gas-A-Mat Security had a duty and an obligation to inform Gas-A-Mat Sales of the deficiencies in its operation (PC ¶51, Applts' Add. p. 79).

s. Gas-A-Mat Security failed to so inform Gas-A-Mat Sales and, as a proximate result, the decedent Maurine Hunsaker was abducted by the defendant Ralph Leroy Menzies and John Does I-V on the 22d day of February, 1986 (PC ¶52, Applts' Add. p. 79).

II.

STATE DEFENDANTS

t. Ralph Menzies was paroled on October 9, 1984 and executed a Standard Parole Agreement with the terms and conditions normally contained in said agreements. In addition, special conditions were placed upon Menzies' parole, to wit: He was to maintain mental health counseling and he was to complete a halfway house program (Applts' Add. p. 27).

u. The Utah State Board of Pardons amended the parole agreement and deleted the requirement of the halfway house, but reaffirmed the portion requiring Menzies to maintain mental health counseling (Applts' Add., pp. 3, 4, 28).

v. While on parole, Menzies received no mental health counseling other than two visits with Dr. Brockbank and no attempt was made to have the condition of maintaining mental health counseling removed from Menzies parole agreement (Applts' Add., p. 37).

w. On or about December 17, 1984, Shepherd received a report that Menzies was threatening an individual with a loaded gun. As a result, Menzies was arrested by Shepherd and placed on a 72 hour no bail hold at the Salt Lake County Jail. Shepherd was informed by the party involved that he did not "want to follow through" and Menzies was released from the 72 hour hold; however, Shepherd did no further investigation and no incident report was filed with the Board of Pardons and Parole (Applts' Add., pp. 5-8, 18, 29-32).

x. On or about May 9, 1985, Shepherd received a loaded .25 caliber semi-automatic pistol from the Defendant/Appellee Ralph Menzies. Menzies' parole agreement specifically prohibited him from being in possession or contact with any type of firearm. Menzies claimed to have taken the weapon from another parolee, one Daniel Bee. Shepherd spoke with Bee's parole officer, but made no attempt to interview Mr. Bee himself to determine the circumstances under which Menzies received the pistol. Shepherd believed the act of turning in the weapon was a sign of good faith on the part of Menzies, but did no further investigation and filed no incident report or report of parole violation with the Board of Pardons (Applts' Add., pp. 1 & 2).

y. On or about December 6, 1985 on a tip from an informant, Shepherd visited the home of Menzies and located some tires which had been stolen from Carmart and located some Christmas decorations that had allegedly been stolen from Ernst.

z. Menzies was arrested and booked into the Salt Lake County Jail on or about December 6, 1985 for the theft of the tires. No incident report was filed with the Board of Pardons and no report of parole violation was filed (Applts' Add., p. 10).

aa. An information to arrest Menzies for theft of the Christmas decorations was prepared on or about January 17, 1986 based at least in part upon information provided by Shepherd. No incident report was filed with the Board of Pardons

and no report of parole violation was filed (Applts' Add., pp. 11, 33, 34).

ab. On or about February 10, 1986, Defendant Menzies plead guilty to the theft of the tires before the Honorable Kenneth Rigtrup and the Department of Adult Probation and Parole and Shepherd were notified of the guilty plea on February 11, 1986. No incident report was filed with the Board of Pardons and Parole and no report of violation was filed (Applts' Add., pp. 35, 37).

ac. On or about February 22, 1986, Defendant Menzies abducted and later murdered the deceased, Maurine Hunsaker. Menzies was charged and later convicted of this crime.

ad. On or about February 24, 1986, Menzies was arrested for the theft of Christmas decorations from Ernst even though the information was issued in January (Applts' Add., pp. 12).

ae. Shepherd requested a warrant to detain Menzies on February 27, 1986. Said request was solely based upon the arrests and Menzies' guilty plea on February 11, 1986. Shepherd admitted that said warrant could have been issued previous to that date and was a device to hold Menzies for the suspected murder of Maurine Hunsaker and not for the thefts (Applts' Add., pp. 13-15).

af. Prior to the warrant request of February 27, 1986, no incident reports or reports of parole violations were submitted to the Board of Pardons on Defendant Menzies by

Shepherd or any of his supervisors. This occurred even though there were at least four separate acts committed by Menzies and admitted to by the State Defendants/Appellees that could be considered parole violations (Applts' Add., pp. 37).

ag. Policies of the Department of Corrections that were in effect at the time required parole violations to be investigated immediately and a report submitted to the Board of Pardons within 72 hours (Applts' Add., pp. 57, 58).

ah. Policy 11.01-A of the Policies and Procedures of the Board of Pardons dated August 27, 1984 required the submission of incident reports by the supervising parole officer to the Board of Pardons when an incident, positive or negative, occurred which could affect parolee's status (Applts' Add., pp. 62, 64).

ai. Menzies had a history of violent acts, both in and out of prison. The Defendant/Appellee Shepherd and his supervisors were aware of Menzies violent history. In fact, Shepherd described Menzies as having "a long history of criminal behavior punctuated by violent acts" (Applts' Add., pp. 16, 17, 19-26).

SUMMARY OF ARGUMENT

This is an action brought by the survivors of Maurine Hunsaker. Mrs. Hunsaker was kidnapped and murdered by Ralph LeRoy Menzies on or about February 24, 1986. At the time of her abduction, Mrs. Hunsaker was employed by Gas-A-Mat at their station located at 3995 West 4700 South, Salt Lake County,

Utah. The station was noted for previous robbery attempts and the management had posted signs indicating that there was electronic surveillance of the area. Mrs. Hunsaker relied upon the representations that surveillance was being kept as indicated by the signs and believe that the security had been provided for by her employer acting in a separate capacity. The Appellants believe that the dual capacity doctrine has application in this situation and the facts support said application.

The Defendant, Ralph L. Menzies, was a convicted felon on parole, supervised, and in the custody of Adult Probation and Parole, Department of Corrections, State of Utah. During his supervised parole, Menzies committed not less than four (4) major parole violations, none of which were reported to the Utah State Board of Pardons. The failure to report parole violations was and is a violation of policy set forth by the Department of Corrections, Division of Adult Probation and Parole.

The relationship between Menzies and AP & P created a duty of due care on the part of AP & P to regulate foreseeable conduct on the part of Ralph L. Menzies. The State Defendants/Appellees failed to take action that was required under that policy thereby breaching their duty of due care. Menzies had a long history of violent acts and the Department of Corrections was aware of this history. Based on the history, the parole violations and the policy created by the Division of Corrections, a duty of due care to all foreseeable, if not

readily identifiable, members of the public existed. By failing to report parole violations to the Board of Pardons and Parole, the Department breached that duty and the State of Utah, through its Department of Corrections, Division of Adult Probation and Parole is liable for that breach.

ARGUMENT

GAS-A-MAT

I.

THE DUAL CAPACITY DOCTRINE IS VIABLE IN UTAH AND DOES PROVIDE AN EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION OF THE WORKER'S COMPENSATION ACT.

While the Utah Supreme Court has not specifically adopted the "dual capacity" doctrine, it has not rejected it either. In Bingham v. Lagoon Corp., 707 P.2d 678 (Utah 1985), and Stewart v. CMI Corp, 740 P.2d 1340 (Utah 1987), the Court carefully reviewed the status of dual capacity. While it is true that the Court did not apply the dual capacity doctrine in either case, it also made it clear that it was not rejecting the doctrine. The Supreme Court refused to apply the doctrine based on the facts of Bingham and Stewart, but did not disagree with the substantive law supporting dual capacity.

The Court, in Bingham, specifically stated that:

> "The argument that the employer owes separate duties to employees as owner of the premises have generally been rejected for the reason that the employer's duty to maintain a safe work place is inseparable from the employer's general duties as an employer towards his employees. We agree with that reason. See the cases discussed at 23 ALR 4th 1163" at 680.

This statement supports the general test for dual capacity as set forth in McCormick v. Caterpillar Tractor Company, 423 N.E.2d 876, 878 (Ill. 1981),

> "...The decisive test is whether the employer's conduct in the second role or capacity has generated obligations that are unrelated to those flowing from the companies or individuals first role as employer. If the obligations are related, the doctrine is not applicable."

and cited as authority in Bingham. In the Bingham case, the Utah Supreme Court merely found that the test had not been met. That employer's obligation to provide a safe work place was the same as a contractor or amusement park operator.

In Stewart, the Plaintiff brought a personal injury action against the decedent's former employer. In Stewart, the Supreme Court applied the dual capacity doctrine to the facts and determined that it did not apply under those circumstances. In fact, the Court stated:

> "The dual capacity doctrine does not apply in this situation because the employer has not assumed a separate and distinct obligation toward his employee other than as an employer", at p. 1341.

The Utah Supreme Court had another opportunity to totally reject the dual capacity doctrine, but again declined.

The dual capacity doctrine is a viable doctrine in the State of Utah assuming that the factual basis is present. Appellants submit that this case does create the situation where an employer has taken on a separate obligation and therefore owes a separate and distinct duty to the individual rather than just

as an employer.

II.

BY TAKING ON THE DUTIES OF PROVIDING SECURITY AT ITS LOCATION, THE DEFENDANT/APPELLEE TOOK ON SEPARATE AND DISTINCT OBLIGATIONS FROM THAT AS THE DECEASED'S EMPLOYER.

Gas-A-Mat stepped out of its role as employer and into the shoes of the provider of security for its retail operations. In doing so, the employer took on additional duties and responsibilities. Prior to decedent's employment with Gas-A-Mat, the Defendant/Appellee installed a sign that read "NOTICE: Electronically Protected Against ROBBERY." This gave an expectation of security to both employees and patrons of Gas-A-Mat. Decedent had a right to rely upon Defendant/Appellee's assertions that security measures had been taken. By stepping into the shoes of the provider of security, the Defendant/Appellee also took on the responsibility of acting as a reasonable provider of security would act. When a party assumes a burden or an obligation, that party has a duty to exercise the normal skill and care anyone in that position would exercise.

In placing the sign, the Defendant/Appellee indicated to all who read it that certain security measures that had been taken. Therefore, Defendant/Appellee is charged with the duties and obligations with which any other provider of security would be charged. In the Trial Court, Defendant/Appellee cited Thomas v. General Electric Company, 493 S.W. 2d 493 (Tenn. 1973) for the proposition that Defendant/Appellee had no obligation to provide security to the

decedent and it was correct. As an employer, the Defendant/Appellee did not have an obligation to provide security. This is reinforced by the Thomas Court quoting Am Jur 2d:

> "Under some circumstances, an employer has been held liable to his employee for injuries resulting from assault by a third person where the employer but not the employee had knowledge or notice of unusual risk of assault by third persons and the employee failed to warn the employee of that danger. Ordinarily, however, an employer is under no legal duty to protect his employees from unlawful assault by strangers and is not as a rule to be held liable for the intentional injury to or killing of his employee by a third person." at 194 (Emphasis added.)

Therefore, the any obligation to the decedent was not arising out of her employment, but out of the dual capacity. Appellants submit that Defendant/Appellee's assumption of the obligation of providing security to the location and failing to do so created the separate duty.

III.

AS AN OWNER OF THE PROPERTY AND A PROVIDER OF SECURITY, THE DEFENDANT/APPELLEE HAD AN OBLIGATION TO ALL THIRD PARTIES ENTERING UPON THE PREMISES TO ACT REASONABLY IN PRECLUDING ANY HARM FROM COMING TO SAID INDIVIDUALS.

Defendant/Appellee is liable for decedent's death due to the negligent manner in which it maintained the premises and provided security. While the owner of the premises and the provider of security are certainly not insurers of the safety of every individual that enters upon the premises, it does have a

responsibility to act in a safe and reasonable manner. This duty is based to a large extent on the status of the person on the premises. Due to Gas-A-Mat's dual capacity , the decedent's status was not that of an employee, but rather that of a business invitee with a reasonable expectation of competent security measures.

An individual or business entity in no special circumstances has no duty to protect another from criminal attack by a third party. However, a business, particularly when the business has taken affirmative steps to provide security, has the duty of exercising ordinary care to maintain its premises in a reasonably safe condition and to provide security in a reasonably safe and competent manner. This obligation goes so far as to include protecting patrons from criminal acts of a third party, Totten v. More Oakland Residential Housing, Inc., 134 Cal Rptr 32 (1976) and even extends so far as taking reasonable and competent measures to protect the personnel performing the security activities, see Pucalik v. Holiday Inns, 777 F.2d 359 (7th Cir. 1985).

The Restatement of the Law of Torts, Second §344 specifies that anyone holding land open to the public for business purposes is liable to the members of the public, while they are on the land, for injuries caused by the intentionally harmful acts of third persons. This, of course, is only true if the possessor of the land fails to take reasonable care governing such acts or did not give adequate warning. If injurious conduct

can be anticipated, the business has a public duty to exercise reasonable care to protect its customers against that danger.

Gas-A-Mat was not only holding its business premises out for public use, but had also undertaken security measures to protect both patrons and others lawfully on the premises. Gas-A-Mat, due to the two previous robberies, was well aware of the dangers that existed. The placing of the sign is clear evidence of this fact. Gas-A-Mat not only had to take reasonable precautions as the possessor of land, but also reasonable steps as a provider of security.

The key question in determining whether or not the possessor of the property and the provider of security is negligent centers around foreseeability. If it is foreseeable for certain injuries to occur, the owner of the premises and provider of security can be held liable. See Barker v. Wah Low, 97 Cal Rptr 85 (1971), Slater v. Alpha Beta, 118 Cal Rptr 561 (1975), Totten v. More Oakland Residential supra, Young v. Desert View Management Corporation, 79 Cal Rptr 848 (1969).

These cases stand for the concept that an owner of property has a duty to protect his business invitees from foreseeable harm. This duty to take reasonable precautions is strengthened even further by Gas-A-Mat's assumption of security obligations.

The question of foreseeability in this case is answered by Gas-A-Mat itself. Gas-A-Mat's installation of the robbery warning sign clearly indicates that it was aware of a

potentially dangerous situation. It undertook to provide the security by the installing the sign, but took none of the measures that the sign indicated had been taken. In this case, it was the duty of Gas-A-Mat to take ordinary care both as the occupier of the land and as the provider of security. This is particularly true where it had knowledge that a course of conduct on the part of an individual on the premises could endanger the lives of the invitees. See Porter v. California Jockey Club, Inc., 285 P.2d 60 (1962), Taylor v. Centennial Bowl, Inc., 52 Cal Rptr 561 (1966) and Edward v. Hollywood Canteen, 167 P.2d 729.

IV.

THE UTAH SUPREME COURT SHOULD ADOPT THE DUAL CAPACITY DOCTRINE DUE TO INACTION BY THE STATE LEGISLATURE

This Court has recognized that, in general, the State Legislature has the duty to modify legislation, see Bingham and Stewart. However, the Court has also recognized that, in the absence of action by the State Legislature, the Court has the authority and the duty to adopt changes, see Wade v. Jobe, 818 P.2d 1006 (Utah 1991) and P.H. Investment v. Oliver, 818 P.2d 1018 (Utah 1991).

STATE DEFENDANTS

V.

INTRODUCTION

In reviewing the Trial Court's Minute Entry filed on April 5, 1991, one thing is painfully clear. The Court failed to understand the arguments as set forth by the Appellants.

Appellants therefore feel it is important to step through each point of the argument so that the basis for Appellants' claim is clear.

It is well established in Utah law and elsewhere that a negligence action has four (4) elements. These elements are duty, breach of the standard of care, causation and damages, see The Law of Torts §30, at 143 (W.L. Prosser 4th Edition 1971). The Trial Court read Appellants' assertions as to duty incorrectly. The Trial Court apparently believed that Appellants asserted that some relationship existed between the decedent, Maurine Hunsaker, and the State Defendants/Appellees. That is clearly not the case. The Appellants have argued consistently throughout this matter that the special relationship was between the State Defendants/Appellees and Menzies, not Maurine Hunsaker. Therefore, the analysis set forth by the Trial Court in its Minute Entry is substantially flawed. In addition, Appellants have never asserted that a duty is created simply by the promulgation of procedures or regulations. Rather, Plaintiff has argued that the duty exists and that the promulgation of regulations and procedures sets forth the standard of care to be met. The Trial Court was mistaken in its belief that Appellants' asserted that the duty is created by promulgation of regulations. This flawed analysis is present in the entire Trial Court decision.

VI.

A DUTY OF DUE CARE EXISTED BETWEEN THE DECEDENT AND THE STATE DEFENDANTS/APPELLEES

The Trial Court relied heavily on three Utah cases in determining whether a duty existed under these circumstances. These decisions are Ferree v. State of Utah, 784 P.2d 149 (1989), Owens v. Garfield, 784 P.2d 1187 (Utah 1989) and Kirk v. State, 784 P.2d 1255 (Utah 1989). Appellants' assert that these cases are consistent with their position. In Ferree, the Court also relied on Thompson v. County of Alameda, 613 P.2d 728 (Cal 1980).

It is important to note the factual basis behind Ferree, Thompson and Kirk. These cases turned on the question on whether the State would be responsible for the release of a violent individual. In Ferree, the inmate was released into the general population, on a weekend pass, without supervision by the Department of Corrections. In Kirk, the inmate was not released, but escaped from the control of the Department of Corrections. In this case, Menzies at all times was subject to the direction and control of the Department of Corrections because of its duty and responsibility to supervise his parole. Those factual distinctions are critical.

In Ferree, the Court specifically referred to the action of releasing prisoners or placing them on parole when discussing the duty issue. The Court has consistently held that the discretionary acts of releasing or placing a person in a particular program does not create a duty towards the public in general, see Doe v. Arguelles, 716 P.2d 279 (Utah 1985) citing

Little v. Utah State Division of Family Services, 667 P.2D 49 (Utah 1983), Payton v. United States, 679 F.2d 475 (5th Cir. 1982); Cairl v. State, 323 N.W.2d 20 (Minn. 1982); Johnson v. State, 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2D 352 (1968); Annot., 6 A.L.R.4th 1155 (1981), and Annot., 5 A.L.R.4th 773 (1981). In Doe v. Arguelles, the Court's inquiry didn't end with the release. The Court went on to examine the quality of supervision and, based on the lack of supervision, found a basis for liability. The Court said:

> A decision or action implementing a preexisting policy is operational in nature and is undeserving of protection under the discretionary function exception. Little v. Utah State Division of Family Services, 667 P.2d at 52; Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Frank v. State, 613 P.2D 517 (Utah 1980). Because a probation officer's policy decisions are discretionary, he is immune from suit arising from those decisions. However, his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial and thereby outside the immunity protections. Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976) (citing Johnson v. State, 447 P.2d at 362).

Even in Ferree, the Court recognized that the obligation to **control the conduct** of a "dangerous" person could very well create a duty of due care on the part of corrections officials. The Court in Ferree also quoted Grimm v. Arizona Board of Pardons and Paroles, 564 P.2d 1227 (Az. 1977) and Cancler v. State, 675 P.2d 57 (Ks 1984). Both of these cases involve parolees with known dangerous propensities. Therefore, even in Ferree, the Court saw that under certain circumstances, there could be a duty created in the supervision of a parolee by the Department of Adult Probation and Parole.

The Court went further in Owens and set forth more specifically what circumstances could create that duty. In Owens, the Utah Court determined that there was a duty to control a third person or a duty to warn if

> (a) A special relation exists between the [defendant] and the third person which imposes a duty on the [defendant] to control the third person's conduct or
>
> (b) A special relation exists between the [defendant] and the other which gives rise to the other right to protection from [from the third person].
>
> Owens at Page 1188. (Emphasis added).

The question of the special relationship on the part of the State Defendants/Appellees goes not only to a relationship between the State Defendants/Appellees and any potential victims, but also to the nature of the relationship between the actor, in this case Menzies, and the State Defendants/Appellees.

A sufficient relationship existed between State Defendants and Menzies to establish a duty of due care. In this case, the Affidavits of the State Defendants/Appellees, clearly show that there was a relationship between Menzies and the State Defendants. They discussed the ability that Shepherd had to pick up Menzies, supervise him, perform unscheduled home visits, require him to meet all the terms and conditions of his parole, and in all other ways, by major part, control his life.

There is no dispute that a special relationship existed between the State Defendants/Appellees and Ralph Menzies.

While the Supreme Court did not find that such a relationship existed between Garfield and the defendants in the Owens v. Garfield case, the Court did cite three cases as examples where those relationships could be found. Those cases are Cansler v. State, 675 P.2d 57 (Ka. 1984) (incarcerated criminal); Peterson v. State, 671 P.2d 230 (Wa. 1983) (confined mental patient); Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986) (parolee who had exhibited dangerous tendencies in prison). An examination of these cases gives a great deal of insight into what is necessary to find a duty of due care in a situation involving the control of a third party.

The Utah courts have looked to Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986). In Neakok, the State argued that, as a supervisor of an individual's parole it was not sufficiently close to give rise to a duty to control him and that a duty should be limited to actual custody. The Court in Neakok rejected that argument and stated:

> We do not believe that a duty to control or warn can be so narrowly limited. Although the State was required to release Nukapigak who remained under State supervision as a parolee it could regulate his movements within the State, require him to report to a parole officer under conditions set by that officer or prison counselor, require him to undergo treatment for alcoholism, and impose and enforce special conditions of parole . . . it could revoke his parole and reincarcerate him if he violated these conditions.

Neakok at 1126.

The special relationship the State Defendants have with the parolee because of its ability to foresee dangers and to

control the activities of the parolee is sufficient to impose a duty of due care on the State. The Court in Neakok went on to determine other factors that must be present where the victim is not subject to ready identification.

There is no question in this case that there was little or no contact between Menzies and the decedent, Maurine Hunsaker. The Court in Neakok dealt with that issue in determining whether it is foreseeable that a person could be endangered by the parolee. With Menzies, his previous crimes would indicate that he would be a danger to anyone engaged in serving the public. In Neakok, the Court stated:

> Where the State, through its negligence, allows a parolee to cause foreseeable harm to a third person, we see no reason to predicate liability wholly on the State's ability to predict the victim's name. A victim may be "foreseeable" without being specifically identifiable.

Neakok at 1129. Maurine Hunsaker fit the "class" of persons who were within foreseeable dangere at the hands of Menzies based on his past criminal record. The State Defendants/Appellees were very much aware of Menzies past record and his tendencies toward violence. That was eloquently stated by Mr. Shepherd in his pre-sentence report. Mr. Shepherd also recognized and admitted that the information was nothing new to him, that he was well aware of Menzies tendencies and violent behavior prior to the pre-sentence report. Again the Appellants would draw the Court's attention to the proposition that the question of foreseeability **of the party's actions** not the **identity** of the victim was the turning point in Neakok. The issue then turned to the duty to protect a

reasonably foreseeable victim from a clearly dangerous individual. These facts are what give rise to a duty of due care on the part of the State and its employees.

The question of foreseeability was raised in Ferree and by the Trial Court in this case during oral argument. Menzies' previous criminal history is a more than adequate demonstration of his dangerous propensities. Menzies was in prison at the time he was paroled for both escape and for aggravated robbery in which an individual was shot. Shepherd himself identified Menzies' propensities in his pre-sentence report when he said "[Menzies] has a long history of criminal behavior punctuated by violent acts." When questioned during his deposition, Shepherd admitted that he was aware of Menzies violent propensities prior to writing the pre-sentence report and even at the beginning of his supervision of Menzies parole. Menzies' actions were foreseeable.

The danger of creating a duty in this manner, which was raised by the Supreme Court in Ferree, is not applicable in this particular case. Here we are talking about the duty created by the relationship between the Department of Corrections and Ralph Menzies. Even under the standard advance by Neakok and Owens, there still must be evidence of violent propensities and the Department must be aware of a those violent propensities before any duty is created.

In Ferree, the Court specifically relied on the fact that the Defendant had shown no previous violent propensities;

Menzies did. Shepherd, in his testimony and in his pre-sentence report, made it clear that the State Defendants/Appellees were well aware of Menzies' violent propensities at the time he was placed on parole. This then created a duty on the part of the State Defendants/Appellees to properly supervise and control Menzies' behavior. Maurine Hunsaker, even if not readily identifiable, in working with the public, was clearly within the range of foreseeability as to Menzies' violent acts. Menzies most recent violent act, prior to his parole, was the aggravated robbery and shooting of a taxi cab driver. This driver was also working with the public. Therefore, the attack on Maurine Hunsaker as a person serving the public was foreseeable.

VII.

STATE DEFENDANTS/APPELLEES BREACHED THE STANDARD OF CARE BY FAILING TO FOLLOW THEIR OWN ESTABLISHED PROCEDURE

As set forth above, the second element of negligence is a breach of the standard of care. In this case, the State Defendants/Appellees had a great deal of latitude in making discretionary decisions. However, if the actions by the State Defendants/Appellees do not fall within the category of discretionary, they are within the scope of what constitutes due care. See Sheffield v. Turner, 445 P.2d 367 (Utah 1968) and Frank v. State, 613 P.2d 517 (Utah 1980). An act which requires the exercise of discretion on the part of an agent or supervisor may be negligent, but a claim may be barred by the governmental immunity provisions referred to in the above-cited cases. In

this case, however, Appellants are not arguing that Shepherd *and/or his supervisors* failed to properly exercise discretionary authority, but, rather, that they failed to comply with established procedures within their own department and the actions were ministerial in nature and not protected, see Doe v. Arguelles, supra.

The State Defendants/Appellees argued that the creation of policies and procedures do not create a duty of due care. This may in fact be true. However, the policies and procedures do set the standard to be followed in dealing with specific occurrences. The State Defendants/Appellees set up a procedure to be followed in the event of parole violations. This procedure was to report all parole violations to the Board of Pardons. In the case of Ralph Menzies, that procedure was not followed.

The Department of Corrections and the Board of Pardons had complete control over the conduct of Ralph Menzies. In the event that he did not comply with the terms and conditions of parole, his parole could be revoked or he could have been placed in a much more restrictive setting. Whether the Board of Pardons actually took those kind of measures against Menzies is not the question here, because the Board of Pardons never had the opportunity to take them.

While State Defendants/Appellees argued that the policies of reporting violations to the Board of Pardons were internal policies and had no effect on Maurine Hunsaker, the

argument is without merit. The Department of Corrections, Division of Adult Probation and Parole, the agency charged with supervision of Menzies, had no authority to revoke parole. It only had the authority to report violations and make recommendations as to appropriate measures to be taken to properly supervise a parolee. The decision as to what measures should be taken was solely within the discretion of the Board of Pardons. Therefore, the failure on the part of Adult Probation and Parole to report repeated parole violations by Menzies to the Board of Pardons effectively prevented the Board of Pardons from exercising its authority and its responsibility over the parolee.

In Doe v. Arguelles, supra, the Court recognized that the failure on the part of a parole officer to properly monitor the actions of his parolee constituted a breach of the standard of care. In Doe v. Arguelles, the Court specifically indicated that if damages are proximately caused by the parole officer's negligence, then the standard elements of negligence law apply.

Menzies, an inmate with known violent tendencies, was placed into the custody of the Department of Corrections, Division of Adult Probation and Parole. This created a relationship between Menzies and the State Defendants/Appellees such that they had a duty to control the conduct of Menzies under these circumstances. This duty extended to all persons for whom it was reasonably foreseeable that they could be harmed by Menzies. Maurine Hunsaker, working at a job where she served the

public, was clearly within that realm of foreseeability. The Department of Corrections established specific procedures to keep the Board of Pardons and Parole informed of violations or exceptional conduct on the part of parolees. These procedures were set up to insure that the decision making body, the Board of Pardons and Parole, could fully exercise its authority regarding its ability to control the conduct of parolees. The Department of Adult Probation and Parole, through its reporting procedures, was an integral part of this authority to control the conduct of Ralph Menzies. The Defendants breached the standard of care by failing to follow their own procedures and file reports.

It has been admitted by the State Defendants/Appellees that the Defendant Menzies violated his parole on at least four occasions and the Plaintiffs/Appellants assert he violated it not less than six times and probably more. Yet none of these violations were ever reported to the Board of Pardons and Parole. Therefore, Adult Probation and Parole, the State Defendants/Appellees, violated the standard of due care and breached its duty to Maurine Hunsaker.

The State Defendants/Appellees have argued that to place liability upon the State in this particular circumstance would place liability upon the State and its agents whenever prison rehabilitation failed. The Supreme Court, in theory, also made that statement. However, there is a significant distinction here. In this case, special conditions existed to create the duty. That in and of itself does not impose liability upon the

State Defendants/Appellees. All the State Defendants/Appellees had to do to avoid liability was to meet the standard of care. Had Shepherd and his supervisors submitted all the reports to the Board of Pardons and Parole and otherwise followed the Division procedures, the standard of care would have been met and no liability could be imposed.

The State is basically asking the Court to allow it to set up policies and procedures, not comply and still not be held to have breached the standard of care. No one is suggesting that merely because a parolee commits a violent act that the State is liable. But if the State fails to do its job, and that failure is based on nondiscretionary actions, then the State should be liable for its actions.

VIII.

CAUSATION IS QUESTION OF FACT TO BE DETERMINED BY THE JURY IN THIS MATTER

Causation is the one issue that with a substantial number of facts in dispute. Victoria Palacios, in her affidavit, basically states that she does not think that the Board of Pardons would have revoked Menzies' parole under the circumstances presented to her. It is important for the Court to note that not all of the alleged parole violations are contained in Ms. Palacios' affidavit. In fact, that is the very problem all throughout this case. The Board of Pardons and Parole was never informed fully about the circumstances surrounding Menzies' activities. Certainly, we can look back with 20/20 hindsight, review all of the documentation, and say the Board of Pardons

would or would not have done this. Unfortunately, that is going to be speculation at best. That decision needs to be made by the finder of fact, in this case the jury, Beach v. University of Utah, 726 P.2d 413 (Utah 1986).

State Defendants/Appellees argued that even with the information the Board of Pardons would not have revoked Menzies' parole. That may in fact be true. However, revocation was not the only option available to the Board of Pardons. Menzies was to receive mental health counseling throughout his parole. He only had two (2) sessions with Dr. Brockbank and was then told that additional mental health counseling would do no good. The State Defendants/Appellees did nothing to inform the Board of Pardons that Menzies was not meeting a condition of his parole. Had they done so, the Board of Pardons could have taken additional action in regard to that special condition. However, it will never be known what the Board would have done. We can only speculate as to what the Board of Pardons would have done if the Department had met its standard of care in providing them with information.

Appellants informed the Trial Court that they intended, through discovery, to review the actions of the Board of Pardons and Parole from August 1, 1984 through March 1, 1986. The evidence gathered from discovery would have been presented to the jury. The Trial Court improperly terminated this process. Even though the matter was presented on summary judgment and questions of fact clearly existed, the Trial Court said that

there was no evidence that the withheld information would have affected the actions, or inaction, of the Board of Pardons. In making this decision, without any findings of fact, the Trial Court usurped the authority of the fact finder.

It is the intent of the Appellants to only touch upon the issue of damages at this point. It is clear that the Appellants have suffered damage as a result of Maurine Hunsaker's death. There is substantial evidence to be presented in that regard, but that is clearly a question of fact and it was not appropriate for the Trial Court to hear. It may be argued that if there are no damages there is no cause of action. The Appellants would merely submit to the Court that there can be no question that damages were suffered. The questions surround the issues of duty, breach, and causation.

IX.

STATE DEFENDANTS/APPELLEES ARE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT. IMMUNITY, IF ANY, IS A "QUALIFIED" IMMUNITY SUBJECT, TO AN APPLICATION OF THE SPECIFIC FACTS OF EACH CASE TO THE EXPRESS PROVISIONS OF THE ACT

The State Defendants/Appellees argued that its entities were immune from suit under the Utah Governmental Immunity Act (hereafter "Act"). Indeed, the Department of Corrections, the Board of Pardons and Parole, and the Department of Adult Probation and Parole perform governmental functions and may be, therefore, entitled to whatever measure of immunity from suit that is provided by the Act. See Sheffield v. Turner, 445 P.2d 367, 368 (Utah 1968). However, according to §63-30-3,

immunity of governmental entities is only a qualified immunity being subject to various exceptions. §63-30-10 enumerates specific exceptions to the immunity enjoyed by State entities. Subsection (1) states:

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:
>
> (a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function whether or not the discretion is abused.

X.

THERE IS NO IMMUNITY TO A STATE DEFENDANT WHOSE ACTS CONSTITUTE THE PERFORMANCE OF A MINISTERIAL FUNCTION

The key consideration of immunity in regard to a particular governmental entity is an understanding of where the line of demarcation between a discretionary function and a ministerial function lies. The purpose for such a distinction is that the Utah Supreme Court has extended immunity to entities performing a discretionary function, but has consistently denied such protection to those performing a ministerial duty. In holding that a City court clerk and her deputy were not immune from a negligence action after improperly docketing court records, the Court expressly stated that in the performance of a ministerial duty such immunity should not be granted, Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977).

The Utah Supreme Court has struggled with the precise definition to adopt in identifying and separating ministerial and

discretionary functions. More recently, the Utah Supreme Court has specifically defined its view of the discretionary, ministerial dichotomy stating:

> a discretionary function under Section 63-30-10(1) is confined to those decisions and acts occurring at the basic policy making level, and not extended to those acts and decisions taking place at the operational level, or, in other words, those which concern routine, everyday matters, not requiring evaluation of broad policy factors." Bigelow v. Ingersoll, 618 P.2d 50, 53 (Utah 1980), see also Frank v. State, 613 P.2d 517, 520 (Utah 1980).

The Supreme Court of California has emphasized the importance of avoiding a literal interpretation of the term "discretion." In Johnson v. State, 447 P.2d 352, 357 (Cal. 1968), the Court ruled that the State is not immune from a negligence action where a parole officer failed to warn the plaintiff of foreseeable, latent danger in accepting the youth, as a result, the plaintiff was assaulted by the youth. In its holding the Court stated, "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance," at 362.

In Carroll v. State, 496 P.2d 888, 891 (Utah 1972), the Utah Supreme Court echoed Johnson by holding that the decision of a road supervisor to use earthen berms in lieu of signs to warn drivers of an abandoned and dangerous road was operational, and as such, did not come under the discretionary function exception.

XI.

AN EXTENSION OF GOVERNMENTAL IMMUNITY IS A "FACTS SENSITIVE ISSUE", WHICH MUST BE DETERMINED ON A CASE BY CASE BASIS

This case focuses on a facts sensitive issue. In such situations, the Utah Supreme Court has indicated, for example, that the decision to place a youth, previously committed to a Youth Detention Center, into the community was a discretionary function, the "probation officer's...acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial and thereby outside the immunity protections" Doe v. Arguelles, 716 P.2d 279 (Utah 1985). Hence, the Court's method of analysis in determining whether the probation officer's actions constituted actionable negligence or were immune from such action focused on his behavior following the youth's release from the detention center. The analysis in the here should parallel that conducted by the Court in Arguelles, and is evidenced by its statement:

> if it can be shown at trial that the injury to plaintiff's ward was proximately caused by Stromberg's (the parole officer) omissions, it did not result from the discretion vested in him to place Arguelles in the community, but from his negligence in monitoring the prescribed treatment after making the discretionary decision to do so. Under those circumstances, the State would not be immune from suit under the discretionary function exception.

Id. at 283.

XII.

THE APPROPRIATE TEST IN DETERMINING THE NATURE OF THE ACTS OF THE STATE DEFENDANTS/APPELLEES IS THE MINISTERIAL OR PLANNING-OPERATIONAL ANALYSIS

The State cited Epting v. State, 546 P.2d 242, 244 (Utah 1976) and State v. Kirk, supra to support its immunity position. These cases are readily distinguished from the present case. In Epting, like Ferree, the release itself was questioned. In Kirk, the inmate was either still incarcerated or had fled all means of control by the State. In either event, the State was not liable. Here, Menzies was under the control of the State Defendants/Appellees and the release itself was not questioned, only the supervision and implementation. The facts of this case more closely parallel Doe v. Arguelles than Epting or Kirk.

Carroll v. State Road Commission, 496 P.2d 888, 891 (Utah 1972) expressly embraced the ministerial or planning-operational analysis, as it is also referred to, as the appropriate methodology in determining the proper situations to grant immunity to the State. See also, Connell v. Tooele City, 572 P.2d 697 (Utah 1977), Frank v. State, 613 P.2d 517 (Utah 1980), Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980), Little v. State, 667 P.2d 49 (Utah 1983), Doe v. Arguelles, 716 P.2d 279 (Utah 1985).

Analogizing to this case, the critical issue is not whether it was a discretionary function to place Menzies on parole, but rather, whether it was ministerial functions that were violated by the State Department of Corrections and the

parole officer in failing to implement and follow their own procedures.

XIII.

STATE DEFENDANTS/APPELLEES HAVE WAIVED THE IMMUNITY OF THE DEPARTMENT OF CORRECTIONS, AND ADULT PROBATION AND PAROLE

The State Defendants/Appellees waived the immunity of the Department of Corrections and Adult Probation and Parole as provided under the Act. As stated in Smith, Clay M., Utah Law Rev., "Misapplication of Governmental Immunity," 186, 188 (1976), "the landmark case on the question of what constitutes a discretionary function for which immunity is not waived is Indian Towing Co. v. United States, 350 U.S. 61 (1955)." In deciding that the Coast Guard's failure to operate a lighthouse, which it had previously committed to do, constituted actionable negligence the court stated:

> once it (the Coast Guard) exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

Id. at 69.

A pivotal case closely comparable to the one now before the Court, and which exemplifies the liability taken upon governmental entities engaging in the treatment of known felons, was decided by the Supreme Court of Arizona, Grimm v. Arizona

Board of Pardons & Paroles, 564 P.2d 1227 (Arizona 1977). Grimm held that the plaintiffs, parents of a man who was killed by a parolee during a robbery, were allowed to bring suit against the Arizona Board of Pardons and Paroles. The Court stated, "we hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and, indeed, is improper," the Court then concluded, "we now abolish the absolute immunity previously granted public officials in their discretionary functions" Id. at 1232, 1233.

Accordingly, by failing to follow its own policies and procedures, the State has waived its right to immunity which is otherwise granted under Utah Code Ann. §63-30-3 (1986). Improper supervision and implementation of policies were not discretionary decisions, but were instead grounded in the typical, mechanical, structured activity mandated by the rules. Because of the ministerial nature of the activities out of which the negligence arose, this Court should deny the State Defendant/Appellees' request to be blanketed under the immunity privilege which is appropriately reserved only for truly discretionary functions.

XIV.

THE STATE DEFENDANTS/APPELLEES ARE NOT ENTITLED TO IMMUNITY UNDER THE INCARCERATIONS OF PERSONS EXCEPTION OF THE ACT

The State Defendants/Appellees unjustifiably argued that they were entitled to immunity under the Incarceration of

Persons Exception of the Act. §63-30-10 (1) and subsection (j) (1986) reads:

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement;

The State cited Epting and Kirk, in its attempt to convince the Trial Court that any injuries caused by a person who is incarcerated grants the State absolute immunity. In his dissenting opinion in Epting, Justice Maughan explains the meaning of the terms "arising out of the incarceration," he states that it "could only mean injuries arising while the incarcerated person was in the prison, or under the direct control of the State, while laboring on a public work" Epting v. State, 546 P.2d 242, 246 (Utah 1976).

The case of Sheffield v. Turner, 445 P.2d 367 (Utah 1968) dealt specifically with the meaning and application of the incarceration exception of the Act. The Court held that a prison inmate was barred from bringing a negligence action against the Warden of the Utah State Prison for injuries inflicted by a fellow inmate. In its holding the Court defined the limitations of the incarceration exception stating:

> there can be no question but that the maintenance of a state prison and the keeping of prisoners therein is a necessary auxiliary of government...it is appropriate to point out that this does not constitute a carte blanche protection for anything that may be done or permitted

in a prison.

Id. at 368. Hence, if this privilege does not extend to every situation which takes place in a prison, certainly it would not extend to the supervision by the parole system. The issues raised by Kirk have been dealt with previously.

The failure of the State to properly perform its responsibilities and duties in supervising the parole of Ralph LeRoy Menzies constitutes a waiver of the immunity otherwise granted to it under the incarceration exception.

CONCLUSION

In the State of Utah, unlike other states, employees who suffer injuries due to the gross negligence of their employers have no statutory right to redress. The dual capacity doctrine gives employees, under certain circumstances, those rights. While the State Legislature has not adopted the dual capacity doctrine, the Utah Supreme Court has the authority to do so.

In this case, Gas-A-Mat intentionally led its customers and its employees to believe that they were being protected by security. In doing so, Gas-A-Mat removed itself from its sole role as the employer of Maurine Hunsaker. By claiming that it was providing security, Gas-A-Mat stepped into that new role. As such, Gas-A-Mat is charged with the ordinary duties and responsibilities of that role.

By indicating to the public and its employees that security was being provided, Gas-A-Mat had an obligation to

provide that security. It did not. Due to Gas-A-Mat's failure to simply do what it said it had done, Maurine Hunsaker was abducted and murdered. The dual capacity doctrine fits the circumstances of this case and should be adopted by the Utah Supreme Court. This matter should then be remanded to the Trial Court for further hearing and the taking of evidence on the issues of negligence.

It is clear that the Trial Court's analysis of Appellants' position as to the State Defendants is substantially flawed. The Appellants have properly argued that a duty existed to Maurine Hunsaker, not out of any special relationship between Mrs. Hunsaker and the State Defendants, but rather out of the relationship between Ralph Menzies and the State Defendants. Ralph Menzies was a clearly dangerous individual. The State of Utah, through the Department of Corrections, Division of Adult Probation and Parole, had a statutory duty to supervise and control the behavior of Ralph Menzies. Because of this statutory duty, a duty to the general public arose.

Menzies' actions towards Maurine Hunsaker, or rather to individuals in the same position as Maurine Hunsaker, were clearly foreseeable. Had the State Defendants complied with their own policies and procedures, Maurine Hunsaker would still be alive. Instead, the State now argues that it had no reason to think that Menzies was a dangerous person. That argument flies in the face of reason. That State's duty to supervise Menzies extended to a duty to protect foreseeable victims from his

behavior. The State failed in that duty.

This Court should reverse the Trial Court's decision on summary judgment and enter judgment in favor of the Appellants as to the issues of duty and breach. This Court should then remand the case back to the Trial Court further hearing on the questions of causation and damages.

Dated this 3 of April, 1992

Respectfully Submitted,

P. GARY FERRERO
Attorney for Appellants

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four true and correct copies of the foregoing Brief of Appellant, this 3 day of April, 1992, to the following:

Debra Moore
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants/Appellees
236 State Capitol Bldg
Salt Lake City, UT 84101

Gary L. Johnson
Richards, Brandt, Miller & Nelson
Attorney for Defendant/Appellee Gas-a-Mat
P.O. Box 2465
Salt Lake City, UT 84110

hunsaker.brf

ATTACHMENTS

ATTACHMENT A

GARY L. JOHNSON
RICHARDS, BRANDT, MILLER
& NELSON
Attorney for Defendant Gas-A-Mat
Oil Corporation of Colorado
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, individually and on behalf of the deceased MAURINE HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER, and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER, Plaintiffs, vs. STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as Supervisors of John Shepard of the Utah State Department	ORDER OF DISMISSAL Civil No. C87-4084 Judge Richard Moffat

of Adult Probation and Parole, JOHN SHEPARD, in his capacity as parole officer, UTAH STATE DEPARTMENT OF ADULT PROBATION AND PAROLE, RALPH LEROY MENZIES, GAS-A-MAT OIL CORP. OF COLORADO, a Colorado corporation and JOHN DOES I-V,

Defendants.

Defendant Gas-A-Mat's Motion to Dismiss having become regularly before the Court on its law and motion calendar; and plaintiff's being represented by P. Gary Ferrero and Richard C. Hutchison; and defendant Gas-A-Mat being represented by Gary L. Johnson, Richard, Brandt, Miller & Nelson, and the Court having reviewed the memoranda of both parties and the legal authorities cited herein, and the Court having heard oral argument, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant Gas-A-Mat's Motion to Dismiss is granted on the merits and with prejudice.

DATED this 21 day of January, 1988.

BY THE COURT:

Honorable Richard Moffat
District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK
By K Cisneros
Deputy Clerk

HUNSAKE4/GLJ

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 7th day of January, 1988, to the following counsel of record:

P. Gary Ferrero
Suite 570
7050 South Union Park Avenue
P.O. Box 7005
Salt Lake City, Utah 84107

Richard C. Hutchison
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Attorney for Defendant
State of Utah

Becky Kapler

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jb12147
9263-069

ATTACHMENT B

ATTACHMENT "B"

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 870904084 PI
vs.	:	
STATE OF UTAH, et al.,	:	
Defendants.	:	

The Court having heard oral argument on and having considered the various memorandum in support of and in opposition to the defendants' Motion for Summary Judgment and now being fully advised in the premises makes and enters this its:

MINUTE ENTRY

The Court is aware of the position of the plaintiffs to the effect that there is no duty of care running to the decedent from the defendants other than if a special relationship exists which give rise to that duty. The "special circumstances" as alleged in this case is based on two factors urged by the plaintiff. First the duty arises because the decedent Maurine Hunsaker was in a "special relationship" by reason of working

with the public. The plaintiff contends that the most recent violent act prior to his parole by Ralph Menzies was the aggravated robbery and shooting of a taxi driver. He further contends that the plaintiff's probation officer knew of the violent propensities of Ralph Menzies and knew of the shooting of the taxi driver. That knowledge is then coupled with the fact that the probation officer failed to report all parole violations to the Board of Pardons thus violating internal procedures established by the Board of Pardons. The parole violations were not the commission of other violent crimes but rather the violation of some remedial terms of parole. Thus the plaintiff's position is that the decedent Maurine Hunsaker was in a "special relationship" to the defendants and in addition that by reason of violation of the parole boards internal reporting procedures and thus its standards the duty to the decendent was breached by the defendants. The Court has some substantial difficulty with this analysis. It seems to the undersigned that the rather arbitrary classification of "persons who work with the public" is simply not a sufficient definition of a certain person or class of persons to be protected by their "special circumstances". The fact of the matter is almost everybody in service industries can be regarded as working with the public and that can run from professors and teachers in colleges and high schools to service station attendants, to bank

tellers, to court employees, to judges, to car hops at drive inns (there are still two in the State of Utah) to police officers, cab drivers and a whole myriad of persons. That classification becomes so general that I believe it becomes self defeating and cannot possibly qualify for the "special relation or special circumstances" definition as set forth in the various applicable Utah cases.

Additionally the Court is not convinced that the failure to report all parole violations to the Board of Pardons would be regarded as a violation of the duty even if one existed in favor of the decedent. There is no evidence that the parole board would have changed the parole conditions of Mr. Menzies nor revoked it nor in any other way take any action which would have afforded greater protection to either a reasonable classification of persons in which Maurine Hunsaker fell or to Mrs. Hunsaker herself. Thus it is the Courts opinion that the State in this case did not have a duty to protect Mrs. Hunsaker in any manner above and different from the duty of protection to the general public which general duty is not even alleged to have been breached and therefore the Motion for Summary Judgment should be granted. In addition there is no clear showing that the violation complained of would have in any way effected the parole status of the perpetrator and thus changed the tragic outcome of this set of circumstances. For these reasons, inter alia, and the ones set forth in the defendants' Memorandum in

Support of the Motion for Summary Judgment, Summary Judgment is granted. Counsel for the defendants will prepare an appropriate order and summary judgment.

DATED this 5th day of April, 1991.

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

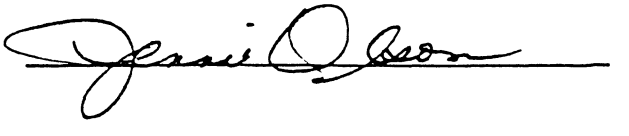
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 5th day of April, 1991:

Michael A. Neider
Lloyd C. Eldredge
NEIDER & WARD
Attorneys for Plaintiff
P. O. Box 57005
Salt Lake City, Utah 84157

P. Gary Ferrero
Attorney for Plaintiffs
P. O. Box 572476
Salt Lake City, Utah 84157

Mariane Baldwin
Assistant Attorney General
Attorney for Defendants
6100 South 300 East, Suite 403
Salt Lake City, Utah 84107



ATTACHMENT C

ATTACHMENT "C"

R. PAUL VAN DAM (3312)
Attorney General
FRANK MYLAR (5116)
Assistant Attorney General
Attorney for Defendants
6100 South 300 East, Suite 204
Salt Lake City, Utah 84107
801-265-5638

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

JIM HUNSAKER,	:	AMENDED ORDER GRANTING
	:	SUMMARY JUDGMENT FOR
Plaintiff,	:	STATE DEFENDANTS
	:	
v.	:	Case No. 870904084 PI
	:	
STATE OF UTAH, et al.,	:	Judge Richard H. Moffat
	:	
Defendants.	:	

THE COURT having considered Defendants State of Utah, Gary Deland, Utah State Department of Corrections, Utah Board of Pardons, Myron March, Ray Wahl, Kent Jones, Joe Smout, John Shepard, and Utah State Adult Probation & Parole's (hereafter "State Defendants") Motion for Summary Judqment, together with all documents and memoranda filed in support of defendants motion and all memoranda and documents filed by plaintiff's objecting to defendants' motion and further having heard oral argument of counsel and having found no geniue issues of material fact, and good cause appearing, the Court now makes the following ruling:

1. Neither the State of Utah nor its entities and officials

owed a legal duty to the plaintiff with respect to defendant Menzies' alleged murder of Maurine Hunsaker.

2. The State defendants are immune from suit under the Utah Governmental Immunity Act.

3. The Utah Board of Pardons and its officials are absolutely immune from suit for its decision relating to the parole of defendant Menzies in this case.

WHEREFORE: Summary Judgment is entered in favor of all State Defendants on all claims brought by plaintiff in this matter based upon the reasons stated in the defendants' memoranda in support of their motion for summary judgment and the reasons stated in the Court's signed minute entry of April 5, 1991.

DATED this 15th day of May, 1991.

Richard H. Moffat
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that on this 23rd day of April, 1991, I mailed, postage prepaid, an exact copy of AMENDED ORDER GRANTING SUMMARY JUDGMENT TO STATE DEFENDANTS to:

P. Gary Ferrero
Attorney for Plaintiff
P.O. Box 572476
Salt Lake City, Utah 84157

Michael A. Neider
Lloyd C. Eldredge
Neider & Ward
P.O. Box 57005
Salt Lake City, Utah 84157

Ralph L. Menzies
UTAH STATE PRISON
P.O. Box 250
Draper, Utah 84020

Frank D. Mylar
ASSISTANT ATTORNEY GENERAL

ATTACHMENT D

ATTACHMENT "D"

MAY 2 9 1991

SALT LAKE COUNTY
By _____ Deputy Clerk

P. GARY FERRERO #1066
Attorney for Plaintiffs
433 S. 400 E.
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	ORDER FOR ENTRY OF FINAL JUDGMENT
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

The Court, in the above entitled matter, having reviewed the pleadings and papers on file herein and having expressly determined, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, that there is no just reason for delay, does hereby:

ORDER, ADJUDGE and DECREE

That all previous orders of the Court having dismissed claims or having granted Summary Judgment are final

Orders and Final Judgment is hereby entered thereon.

DATED this 29th day of May, 1991.

BY THE COURT:

HONORABLE RICHARD H. MOFFAT
Judge, Third District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Order for Entry of Final Judgment , this 29 day of May, 1991, to the following:

Frank Mylar
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants
6100 S. 300 E.
Salt Lake City, UT 84107

Gary L. Johnson
Richards, Brandt, Miller & Nelson
Attorney for Defendant Gas-a-Mat
P.O. Box 2465
Salt Lake City, UT 84110

lme hunsaker.ofj

ATTACHMENT E

ATTACHMENT "E"

JUN 27 1991

By _____

P. GARY FERRERO #1066
Attorney for Plaintiffs
433 S. 400 E.
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	EX PARTE ORDER EXTENDING TIME TO FILE NOTICE OF APPEAL
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

The above entitled Court having reviewed Plaintiffs' Ex Parte Motion to Extend Time, the pleadings and papers on file herein, having been fully advised in the premises, and for good cause shown does hereby,

ORDER, ADJUDGE and DECREE:

That Plaintiffs' time to file a Notice of Appeal in

the above entitled matter is extended by thirty (30) days.

DATED this 27th day of June, 1991.

By the ~~Court~~:

HON. RICHARD H. MOFFAT
Judge, Third District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Ex Parte Order, this 27 day of June, 1991, to Frank Mylar, Assistant Attorney General and R. Paul Van Dam, Utah Attorney General, Attorneys for Defendants, 6100 S. 300 E., Salt Lake City, UT 84107.

lme hunsaker.eop

ATTACHMENT F

ATTACHMENT "F"

P. GARY FERRERO #1066
Attorney for Plaintiffs
433 S. 400 E.
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	NOTICE OF APPEAL
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

TO THE ALL PARTIES AND THEIR ATTORNEYS:

You and each of you will take notice that Plaintiffs, in the above entitled matter, hereby appeal to the Utah Supreme Court, pursuant to Utah Code Ann., Section 78-2-2(3)(j), from the Order of Dismissal, entered the 1st day of February, 1988, dismissing Plaintiffs' claim against the Defendant Gas-A-Mat Oil Corporation of Colorado and from the Amended Order Granting Summary Judgment to the State Defendants entered May 15, 1991, granting Summary Judgment in favor of all remaining defendants, except for Defendant Ralph LeRoy Menzies, issued by the Honorable Richard H. Moffat,

Judge, Third Judicial District Court for Salt Lake County, State of Utah. These orders were certified as Final Judgments pursuant to Rule 54(b) of the Utah Rules of Civil Procedure by an Order entered on the 29th day of May, 1991.

DATED this 25 day of July, 1991.

P. GARY FERRERO

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Notice of Appeal, this 26th day of July, 1991, to the following:

Frank Mylar
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants
6100 S. 300 E.
Salt Lake City, UT 84107

Gary L. Johnson
Richards, Brandt, Miller & Nelson
Attorney for Defendant Gas-a-Mat
P.O. Box 2465
Salt Lake City, UT 84110

lme hunsaker.noa

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LLOYD C. ELDREDGE #3927
Attorney for Plaintiffs/Appellees
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Salt Lake City, Utah 84157-0005
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IN THE UTAH SUPREME COURT

JIM HUNSAKER, individually and on behalf of the deceased MAURINE HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER, and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER, Plaintiffs/Appellees, vs. STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as Supervisors of John Shepard of the Utah State Department of Adult Probation and Parole,	**DOCKETING STATEMENT** Subject to Assignment to the Court of Appeals Appellate Court No. 910366

JOHN SHEPARD, in his capacity as parole officer, UTAH STATE DEPARTMENT OF ADULT PROBATION AND PAROLE, GAS-A-MAT OIL CORP OF COLORADO, a Colorado corporation and JOHN DOES I-V,

Defendants/Appellants.

---

1. DATE OF ENTRY OF JUDGMENT OR ORDER APPEALED FROM: The Order of Dismissal entered the 1st day of February, 1988 dismissing Plaintiffs' claims against the Defendant Gas-A-Mat Oil Corporation of Colorado and the Amended Order granting Summary Judgment to the State Defendants entered May 15, 1991.

2. NATURE OF POST JUDGMENT MOTIONS AND DATES FILED: Motion to enlarge time in which to file Notice of Appeal dated June 27, 1991 and Order granting additional thirty (30) days in which to file Notice of Appeal entered June 27, 1991.

3. DATE OF ORDER OF DETERMINATION OF FINAL JUDGMENT UNDER UTAH RULE OF CIVIL PROCEDURE 54(b): May 29, 1991.

4. DATE OF FILING OF NOTICE OF APPEAL: July 26, 1991.

5. JURISDICTION: The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann., Section 78-2-2(3)(j).

6. NAME OF TRIAL COURT OR AGENCY: The Third Judicial District Court in and for Salt Lake County, State of Utah.

7. STATEMENT OF FACTS: This is an action brought by the survivors of Maurine Hunsaker. Mrs. Hunsaker was kidnapped and murdered by Ralph LeRoy Menzies on or about February 24, 1986. At the time of her abduction, Mrs. Hunsaker was employed by Gas-A-Mat at their station located at 3995 West 4700 South,

Salt Lake County, Utah. The station was noted for previous robbery attempts and the management had posted signs indicating that there was electronic surveyance of the area. Mrs. Hunsaker relied upon the assurance of surveyance as indicated by the signs and believe that the security had been provided for by her employer acting in a separate capacity. The Plaintiffs believe that the dual capacity doctrine as set forth by the Supreme Court has application in this situation and the facts support said application. Bingham v. Lagoon Corp., 707 P.2d 678 (Utah 1985).

The Defendant Ralph L. Menzies was a convicted felon on parole, supervised, and in the custody of Adult Probation and Parole, Department of Corrections, State of Utah. During his supervised parole, Menzies committed not less than four (4) major parole violations, none of which were reported to the Utah State Board of Pardons. The failure to report parole violations was and is a violation of policy set forth by the Department of Corrections, Division of Adult Probation and Parole.

The relationship between Menzies and AP & P created a duty of due care on the part of AP & P to regulate foreseeable conduct on the part of Ralph L. Menzies. Owens v. Garfield, 125 Utah Adv. Rpt. 3 (1989). The State Defendants failed to take action that was required under that policy thereby breaching their duty of due care. Menzies had a long history of violent acts and the Department of Corrections was aware of this history. Based on the history, the parole violations and the

policy created by the Division of Corrections, a duty of due care to all members of the public in which it was foreseeable that Menzies could come in contact existed. Doe v. Arguelles, 716 P.2d 279 (Utah 1985) and Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986). By failing to report parole violations to the Board of Pardons and Parole, the Department breached that duty and the State of Utah, Department of Corrections, Division of Adult Probation and Parole are liable for that breach.

8. ISSUES FOR REVIEW AND STANDARD OF REVIEW:

a. Defendant Gas-A-Mat Oil Corporation of Colorado: The Court granted Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Plaintiffs contend that the dual capacity doctrine advanced by the Utah Supreme Court in Bingham supports the position that an employer may act in a dual capacity. In reviewing a court's dismissal of a complaint pursuant to Rule 12(b)(6), the standard of review is that the Appellate Court must review the case in the light most favorable to the party whose complaint was dismissed. Since there are no findings of fact, the Appellate Court may substitute its judgment for that of the Trial Court. See Ferree v. State of Utah, 784 P.2d 149 (Utah 1989).

b. State Defendants: The issue presented is what duty is created on the part of a state agency to members of the public in general. The Court has indicated that a duty may be created either by a special relationship between the State

and the victim or by a special relationship between the State and the third-party actor. The Plaintiffs assert that that third-party actor was being supervised by the State Defendants, thereby creating a duty to regulate foreseeable conduct against foreseeable (if not readily identifiable) Plaintiffs. Plaintiffs' claims against the State were denied on a Motion for Summary Judgment, therefore, the Court must review the facts in the light most favorable to the Plaintiff and determine if any material issues of fact exist. In that no findings of facts have been entered, the standard is that the Appellate Court may substitute its judgment for that of the Trial Court in that these are questions of law. See Ferree, supra.

9. DETERMINATION OF CASE BY SUPREME COURT: This case involves primary and significant issues. In Bingham, the Utah Supreme Court opened the door for the dual capacity doctrine to be imposed upon employers. It is a significant issue and the extent of that opening should be finally resolved by the Utah Supreme Court and not by the Court of Appeals.

Similarly in Ferree and Owens, the Utah Supreme Court dealt with the question of duty to the general public by a state defendant. In Ferree, the Court appeared to take away the liability of a state defendant to the public at large. However, in Owens the Court set forth two relationships which could create this duty. This particular opinion seems to be in conflict with the Ferree decision. These, taken together with the Court's decision in Doe, adds to the apparent conflict.

It is vitally important that the Utah Supreme Court determine, once and for all, based upon previous decisions, under what circumstances a duty to the general public exists so that the State could become liable for negligence on the part of its employees.

10. DETERMINATIVE LAW: There are no determinative statutes, rules or cases in this situation.

11. RELATED APPEALS: There have been no related or prior appeals.

12. ATTACHMENTS:

Attachment A - Order of Dismissal, dated February 1, 1988;

Attachment B - Minute Entry granting Summary Judgment, dated April 5, 1991;

Attachment C - Amended Order granting Summary Judgment, dated May 15, 1991;

Attachment D - Order for Entry of Final Judgment, dated May 29, 1991;

Attachment E - Order Enlarging Time to File Notice of Appeal, dated June 27, 1991; and

Attachment F - Notice of Appeal, dated July 26, 1991.

DATED this 16 day of August, 1991.

P. Gary Ferrero

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Docketing Statement, postage prepaid, this 16 day of August, 1991, to the following:

Frank Mylar
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants
6100 South 300 East
Salt Lake City, Utah 84107

Gary L. ~~Richards~~ Johnson
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Defendant Gas-A-Mat
P.O. Box 2465
Salt Lake City, Utah 84110

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GARY L. JOHNSON
RICHARDS, BRANDT, MILLER
& NELSON
Attorney for Defendant Gas-A-Mat
Oil Corporation of Colorado
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, individually and on behalf of the deceased MAURINE HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER, and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER, Plaintiffs, vs. STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as Supervisors of John Shepard of the Utah State Department	ORDER OF DISMISSAL Civil No. C87-4084 Judge Richard Moffat

of Adult Probation and Parole, JOHN SHEPARD, in his capacity as parole officer, UTAH STATE DEPARTMENT OF ADULT PROBATION AND PAROLE, RALPH LEROY MENZIES, GAS-A-MAT OIL CORP. OF COLORADO, a Colorado corporation and JOHN DOES I-V,

Defendants.

Defendant Gas-A-Mat's Motion to Dismiss having become regularly before the Court on its law and motion calendar; and plaintiff's being represented by P. Gary Ferrero and Richard C. Hutchison; and defendant Gas-A-Mat being represented by Gary L. Johnson, Richard, Brandt, Miller & Nelson, and the Court having reviewed the memoranda of both parties and the legal authorities cited herein, and the Court having heard oral argument, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant Gas-A-Mat's Motion to Dismiss is granted on the merits and with prejudice.

DATED this 21 day of January, 1988.

BY THE COURT:

Honorable Richard Moffat
District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK
By K Spatafas
Deputy Clerk

HUNSAKE4/GLJ

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 7th day of January, 1988, to the following counsel of record:

P. Gary Ferrero
Suite 570
7050 South Union Park Avenue
P.O. Box 7005
Salt Lake City, Utah 84107

Richard C. Hutchison
NEIDER & HUTCHISON
Suite 570
7050 South Union Park Avenue
P.O. Box 7005
Salt Lake City, Utah 84107

Stuart W. Hinckley
Brent A. Burnett
Capitol Bldg., Suite 236
Salt Lake City, UT 84114
Attorney for Defendant
State of Utah

Becky Kapler

HUNSAKE4/GLJ
jbl2147
9263-069

ATTACHMENT "B"

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 870904084 PI
vs.	:	
STATE OF UTAH, et al.,	:	
Defendants.	:	

The Court having heard oral argument on and having considered the various memorandum in support of and in opposition to the defendants' Motion for Summary Judgment and now being fully advised in the premises makes and enters this its:

MINUTE ENTRY

The Court is aware of the position of the plaintiffs to the effect that there is no duty of care running to the decedent from the defendants other than if a special relationship exists which give rise to that duty. The "special circumstances" as alleged in this case is based on two factors urged by the plaintiff. First the duty arises because the decedent Maurine Hunsaker was in a "special relationship" by reason of working

with the public. The plaintiff contends that the most recent violent act prior to his parole by Ralph Menzies was the aggravated robbery and shooting of a taxi driver. He further contends that the plaintiff's probation officer knew of the violent propensities of Ralph Menzies and knew of the shooting of the taxi driver. That knowledge is then coupled with the fact that the probation officer failed to report all parole violations to the Board of Pardons thus violating internal procedures established by the Board of Pardons. The parole violations were not the commission of other violent crimes but rather the violation of some remedial terms of parole. Thus the plaintiff's position is that the decedent Maurine Hunsaker was in a "special relationship" to the defendants and in addition that by reason of violation of the parole boards internal reporting procedures and thus its standards the duty to the decendent was breached by the defendants. The Court has some substantial difficulty with this analysis. It seems to the undersigned that the rather arbitrary classification of "persons who work with the public" is simply not a sufficient definition of a certain person or class of persons to be protected by their "special circumstances". The fact of the matter is almost everybody in service industries can be regarded as working with the public and that can run from professors and teachers in colleges and high schools to service station attendants, to bank

tellers, to court employees, to judges, to car hops at drive inns (there are still two in the State of Utah) to police officers, cab drivers and a whole myriad of persons. That classification becomes so general that I believe it becomes self defeating and cannot possibly qualify for the "special relation or special circumstances" definition as set forth in the various applicable Utah cases.

Additionally the Court is not convinced that the failure to report all parole violations to the Board of Pardons would be regarded as a violation of the duty even if one existed in favor of the decedent. There is no evidence that the parole board would have changed the parole conditions of Mr. Menzies nor revoked it nor in any other way take any action which would have afforded greater protection to either a reasonable classification of persons in which Maurine Hunsaker fell or to Mrs. Hunsaker herself. Thus it is the Courts opinion that the State in this case did not have a duty to protect Mrs. Hunsaker in any manner above and different from the duty of protection to the general public which general duty is not even alleged to have been breached and therefore the Motion for Summary Judgment should be granted. In addition there is no clear showing that the violation complained of would have in any way effected the parole status of the perpetrator and thus changed the tragic outcome of this set of circumstances. For these reasons, inter alia, and the ones set forth in the defendants' Memorandum in

Support of the Motion for Summary Judgment, Summary Judgment is granted. Counsel for the defendants will prepare an appropriate order and summary judgment.

DATED this 5-21 day of April, 1991.

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

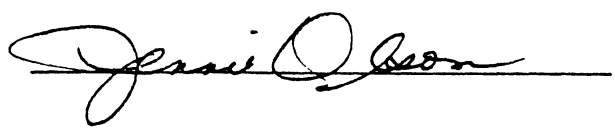
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 5th day of April, 1991:

Michael A. Neider
Lloyd C. Eldredge
NEIDER & WARD
Attorneys for Plaintiff
P. O. Box 57005
Salt Lake City, Utah 84157

P. Gary Ferrero
Attorney for Plaintiffs
P. O. Box 572476
Salt Lake City, Utah 84157

Mariane Baldwin
Assistant Attorney General
Attorney for Defendants
6100 South 300 East, Suite 403
Salt Lake City, Utah 84107



ATTACHMENT "C"

R. PAUL VAN DAM (3312)
Attorney General
FRANK MYLAR (5116)
Assistant Attorney General
Attorney for Defendants
6100 South 300 East, Suite 204
Salt Lake City, Utah 84107
801-265-5638

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

JIM HUNSAKER,	:	**AMENDED ORDER GRANTING**
	:	**SUMMARY JUDGMENT FOR**
Plaintiff,	:	**STATE DEFENDANTS**
	:	
v.	:	Case No. 870904084 PI
	:	
STATE OF UTAH, et al.,	:	Judge Richard H. Moffat
	:	
Defendants.	:	

THE COURT having considered Defendants State of Utah, Gary Deland, Utah State Department of Corrections, Utah Board of Pardons, Myron March, Ray Wahl, Kent Jones, Joe Smout, John Shepard, and Utah State Adult Probation & Parole's (hereafter "State Defendants") Motion for Summary Judqment, together with all documents and memoranda filed in support of defendants motion and all memoranda and documents filed by plaintiff's objecting to defendants' motion and further having heard oral argument of counsel and having found no geniue issues of material fact, and good cause appearing, the Court now makes the following ruling:

1. Neither the State of Utah nor its entities and officials

owed a legal duty to the plaintiff with respect to defendant Menzies' alleged murder of Maurine Hunsaker.

2. The State defendants are immune from suit under the Utah Governmental Immunity Act.

3. The Utah Board of Pardons and its officials are absolutely immune from suit for its decision relating to the parole of defendant Menzies in this case.

WHEREFORE: Summary Judgment is entered in favor of all State Defendants on all claims brought by plaintiff in this matter based upon the reasons stated in the defendants' memoranda in support of their motion for summary judgment and the reasons stated in the Court's signed minute entry of April 5, 1991.

DATED this 15th day of May, 1991.

Richard H. Moffat
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that on this 29th day of April, 1991, I mailed, postage prepaid, an exact copy of AMENDED ORDER GRANTING SUMMARY JUDGMENT TO STATE DEFENDANTS to:

P. Gary Ferrero
Attorney for Plaintiff
P.O. Box 572476
Salt Lake City, Utah 84157

Michael A. Neider
Lloyd C. Eldredge
Neider & Ward
P.O. Box 57005
Salt Lake City, Utah 84157

Ralph L. Menzies
UTAH STATE PRISON
P.O. Box 250
Draper, Utah 84020

Frank D. Mylar
ASSISTANT ATTORNEY GENERAL

ATTACHMENT "D"

MAY 2 9 1991

By _____

P. GARY FERRERO #1066
Attorney for Plaintiffs
433 S. 400 E.
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	ORDER FOR ENTRY OF FINAL JUDGMENT
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

The Court, in the above entitled matter, having reviewed the pleadings and papers on file herein and having expressly determined, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, that there is no just reason for delay, does hereby:

ORDER, ADJUDGE and DECREE

That all previous orders of the Court having dismissed claims or having granted Summary Judgment are final

Orders and Final Judgment is hereby entered thereon.

DATED this 29th day of May, 1991.

BY THE COURT:

HONORABLE RICHARD H. MOFFAT
Judge, Third District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Order for Entry of Final Judgment , this 29 day of May, 1991, to the following:

Frank Mylar
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants
6100 S. 300 E.
Salt Lake City, UT 84107

Gary L. Johnson
Richards, Brandt, Miller & Nelson
Attorney for Defendant Gas-a-Mat
P.O. Box 2465
Salt Lake City, UT 84110

lme hunsaker.ofj

ATTACHMENT "E"

JUN 27 1991

SALT LAKE COUNTY
By K. Cyclopus
Deputy

P. GARY FERRERO #1066
Attorney for Plaintiffs
433 S. 400 E.
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	EX PARTE ORDER EXTENDING TIME TO FILE NOTICE OF APPEAL
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

The above entitled Court having reviewed Plaintiffs' Ex Parte Motion to Extend Time, the pleadings and papers on file herein, having been fully advised in the premises, and for good cause shown does hereby,

ORDER, ADJUDGE and DECREE:

That Plaintiffs' time to file a Notice of Appeal in

the above entitled matter is extended by thirty (30) days.

DATED this 27th day of June, 1991.

By the ~~Court~~:

HON. RICHARD H. MOFFAT
Judge, Third District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Ex Parte Order, this 27 day of June, 1991, to Frank Mylar, Assistant Attorney General and R. Paul Van Dam, Utah Attorney General, Attorneys for Defendants, 6100 S. 300 E., Salt Lake City, UT 84107.

lme hunsaker.eop

ATTACHMENT "F"

P. GARY FERRERO #1066
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Telephone: (801) 261-0265

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, et al.,	)	
Plaintiffs,	)	NOTICE OF APPEAL
vs.	)	
STATE OF UTAH, et al.,	)	Civil No. 870904084PI
Defendants.	)	Judge Richard H. Moffat

TO THE ALL PARTIES AND THEIR ATTORNEYS:

You and each of you will take notice that Plaintiffs, in the above entitled matter, hereby appeal to the Utah Supreme Court, pursuant to Utah Code Ann., Section 78-2-2(3)(j), from the Order of Dismissal, entered the 1st day of February, 1988, dismissing Plaintiffs' claim against the Defendant Gas-A-Mat Oil Corporation of Colorado and from the Amended Order Granting Summary Judgment to the State Defendants entered May 15, 1991, granting Summary Judgment in favor of all remaining defendants, except for Defendant Ralph LeRoy Menzies, issued by the Honorable Richard H. Moffat.

Judge, Third Judicial District Court for Salt Lake County, State of Utah. These orders were certified as Final Judgments pursuant to Rule 54(b) of the Utah Rules of Civil Procedure by an Order entered on the 29th day of May, 1991.

DATED this 25 day of July, 1991.

P. GARY FERRERO

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Notice of Appeal, this 26th day of July, 1991, to the following:

Frank Mylar
Assistant Attorney General
R. Paul Van Dam
Attorney General for the State of Utah
Attorneys for State Defendants
6100 S. 300 E.
Salt Lake City, UT 84107

Gary L. Johnson
Richards, Brandt, Miller & Nelson
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Salt Lake City, UT 84110

lme hunsaker noa

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JIM HUNSAKER, individually and on behalf of the deceased MAURINE HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER, and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER,

Plaintiffs,

vs.

STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL, as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as

910366

COMPLAINT

Civil No. _____

Judge _____

Supervisors of John Shepard
of the Utah State Department)
of Adult Probation and Parole,
JOHN SHEPARD, in his capacity)
as parole officer, UTAH STATE
DEPARTMENT OF ADULT PROBATION)
AND PAROLE, RALPH LEROY MENZIES,
GAS-A-MAT OIL CORP OF COLORADO,)
a Colorado corporation and JOHN
DOES I-V,)
Defendants.

PRELIMINARY STATEMENT

This is an action brought by the husband of the deceased, Maurine Hunsaker, on behalf of himself and by the mother of the deceased, Betty Sudweeks, on behalf of Matt, Nicholas and Dana Hunsaker. Maurine Hunsaker was employed by Gas-A-Mat Oil Corp. of Colorado (Gas-A-Mat) at a station on 3995 West 4700 South, Salt Lake County, Utah. On the evening of February 23, 1986, the deceased was abducted by the defendant Ralph Leroy Menzies and accomplices identified as John Does I-V. Menzies had been released from the Utah State Prison on parole through the action of the Utah State Board of Pardons and Parole as then constituted.

At the time of his release, Menzies was serving a term of five years to life for aggravated robbery and he was convicted of that offense in or about September of 1976, a term of one to fifteen years for escape and he was convicted of that offense in or about July of 1978 and a term of five years to life for aggravated robbery and he was convicted of that offense in August of 1978. The plaintiffs contend that the defendants Board of Pardons and Department of Corrections

failed to apply previously existing policy guidelines in determining the release date of Ralph Menzies. Therefore, the act by the Board and Department did not fall within the governmental or judicial immunity provisions.

On or about the 25th day of February, 1986, police discovered the body of the deceased Maurine Hunsaker in Big Cottonwood Canyon at Storm Mountain, Salt Lake County, State of Utah. The autopsy report indicated that she had been killed by either strangulation, lacerations to the throat and neck or a combination of the two. None of the wounds were self-inflicted nor would have occurred naturally. Shortly thereafter, Ralph Leroy Menzies was arrested for the abduction and murder of the deceased. Plaintiffs also contend that defendant Menzies' parole officer, John Shepard, and the Department of Adult Probation and Parole failed to properly implement already designated policies and procedures in supervising the defendant Ralph Menzies.

At the time of the abduction, Maurine Hunsaker was employed at the Gas-A-Mat Service Station. She was employed as a cashier. In regard to her employment, Gas-A-Mat was acting in a dual capacity. Gas-A-Mat was acting as a gasoline retailer with all the attendant responsibilities and obligations to its employees. Gas-A-Mat was also operating as a provider of security for the individual stations, (hereinafter, the retail operation shall be referred to as "Gas-a-Mat Sales" and the security operation as "Gas-a-Mat

Security). Maurine Hunsaker was in no way employed by the entity of Gas-A-Mat that was providing security for the stations. Plaintiffs contend that Gas-A-Mat Security had a responsibility to all individuals entering upon the premises of Gas-A-Mat to protect them in a reasonable manner. Plaintiffs also contend that Gas-A-Mat Security failed to do so with respect to Maurine Hunsaker and its failure to take adequate security precautions was a proximate cause of her abduction and death.

PLAINTIFFS

1. Plaintiff Jim Hunsaker is a thirty-one year old male who was married to the decedent on the 4th day of February, 1984.

2. As a result of their marriage, Jim and Maurine Hunsaker had two natural children, Nicholas and Dana.

3. Shortly after the death of Maurine Hunsaker, Jim Hunsaker adopted Matt, Maurine's natural child, as his own child.

4. The children of Maurine Hunsaker, Nicholas, Dana and Matt, are all minors under the age of 18 years and are currently in the legal custody of Betty Sudweeks, the natural mother of the decedent. All plaintiffs are proper parties under Utah Code Ann. 78-11-1 et seq.

DEFENDANTS

5. The defendant State of Utah is a body politic

and has a responsibility and obligation to properly supervise all agencies and employees under its control.

6. The defendants Gary Deland, as the director of the Department of Corrections, and the Department of Corrections have the obligation to properly supervise all agencies and employees directly under their control including the Utah State Department of Adult Probation and Parole.

7. The defendant Gas-A-Mat Oil Corp of Colorado, Inc. is a Colorado corporation organized and existing under the laws of the State of Colorado and is doing business in Salt Lake County, State of Utah.

8. The Board of Pardons and Parole (hereinafter "Board") is charged with the responsibility of properly implementing existing policy in determining whether those convicted of crimes should be released on parole and the terms and conditions of said release.

9. The defendant John Shepard, as a parole officer with the Utah State Department of Adult Probation and Parole, was charged with the responsibility to properly supervise the terms and conditions of parole for the defendant Ralph Leroy Menzies.

10. The defendants Ray Wall, Kent Jones and Joe Smout were the direct supervisors of the defendant John Shepard and are charged with the obligation of properly supervising individuals under their care and responsibility.

11. Ralph Leroy Menzies is a convicted felon who at

the time of his release in 1984 was serving two five-year to life sentences concurrently for aggravated robbery and a one to fifteen-year sentence for escape.

12. John Does I through V are believed to be accomplices of and/or assisted Ralph Leroy Menzies in the commission of the acts described herein. These individuals are unknown to plaintiffs at this time and plaintiffs request permission of the Court to amend this Complaint when said identities are known.

13. The plaintiffs have complied with the Utah Governmental Immunity Act, Utah Code Ann. Section 63-30-1 et seq. in that notice was given to the State of Utah through the Office of the Attorney General on or about the 28th day of July, 1986. No determination as to the claim was ever made by the Office of the Attorney General, and ninety days after the notification date, the statute of limitations began to run.

VENUE

14. The plaintiffs and defendants are residents of Salt Lake County and all the acts complained of herein occurred within Salt Lake County, State of Utah.

FACTUAL ALLEGATIONS

15. On or about the 15th day of September, 1976, defendant Menzies was convicted and sentenced to five years to life in prison on charges of aggravated robbery.

16. On or about the 18th day of August, 1978, defendant Menzies was convicted and sentenced to five years to

life on charges of aggravated robbery.

17. On or about the 22nd day of July, 1978, defendant Menzies was convicted and sentenced to one to fifteen years on charges of escape.

18. Two of these sentences (for robbery and escape) were to be served concurrently with one to be served consecutively.

19. Prior to the 9th day of October, 1984, defendant Menzies appeared before defendant Parole Board at a regularly scheduled parole hearing.

20. Defendant Board had before it the records of defendant Menzies convictions and criminal activity, including recommendations from counselors that said defendant "never be released."

21. The defendant Board reviewed defendant Menzies criminal record, had an opportunity to examine each conviction and the sentence imposed and should have applied the written guidelines then in effect to determine whether parole should be granted and under what terms and conditions.

22. Defendant Board failed to properly apply its written policies and guidelines to the criminal activities of defendant Menzies.

23. Had defendant Board properly applied its written policies and guidelines, the defendant Menzies would not have been released on parole under any terms and conditions until at least the year 1988.

24. This application of policies and guidelines required no discretionary decision but was merely the application of said guidelines to the crimes and sentences for which defendant Menzies had been convicted and sentenced.

25. Therefore, the defendant Board failed in its responsibility to properly apply and implement policy guidelines and standards previously in effect.

26. Defendant Menzies was released from incarceration on the 9th day of October, 1984 under certain terms and conditions of parole.

27. The defendant Menzies was assigned to the Utah State Department of Adult Probation and Parole as provided for by statute.

28. The defendant Menzies was assigned the defendant John Shepard as his parole officer.

29. Defendant Shepard is directly supervised by defendant Kent Jones. Defendant Joe Smout and Myron March also had the obligation and duty to properly supervise Shepard's control of defendant Menzies.

30. Terms and conditions of defendant Menzies' parole were, including but not limited to:

a. He was to report regularly to defendant Shepard.

b. He was not to engage in any criminal activity.

c. He was to attend appointed mental health

counseling on a weekly basis.

d. He was not to associate with known felons.

31. Defendant Menzies failed to keep the terms and conditions of his parole.

32. Defendant Shepard knew or should have known that defendant Menzies was not keeping the terms and conditions of his parole.

33. Defendants Jones and Smout as the supervisors of defendant Shepard knew or should have known that defendant Shepard was not properly supervising defendant Menzies in the terms and conditions of his parole.

34. During the time from the 9th day of October, 1984 when defendant Menzies was released until the 24th day of February, 1986 when defendant Menzies was arrested on a charge of robbery and subsequently charged with the abduction and murder of the decedent Maurine Hunsaker, no attempts were made by the Department of Adult Probation and Parole to violate Menzies' parole and require him to begin serving his regularly imposed sentences.

35. The decedent Maurine Hunsaker was employed by defendant Gas-A-Mat Oil Corp of Colorado (hereinafter "Gas-A-Mat") on the 23rd day of February, 1986. She was employed by Gas-A-Mat as a cashier at its station located at 3995 West 4700 South, Salt Lake County, Utah.

36. Decedent's duties consisted primarily of monitoring the customers at said Gas-A-Mat location and

receiving payment from them for products purchased.

37. At all times material hereto, defendant Gas-A-Mat served in two capacities in its retail gasoline operation.

38. Defendant Gas-A-Mat served as a retailer of gasoline products and in that capacity was the employer of Maurine Hunsaker.

39. As the employer of Maurine Hunsaker, Gas-A-Mat had duties and obligations attendant between all employers and employees.

40. These duties included but were not limited to payments for services rendered, collection of withholding and social security taxes, provision of a safe work place (with safe meaning safe from industrial accidents) and other obligations and requirements. Defendant Gas-A-Mat, as Maurine Hunsaker's employer, generally fulfilled these duties and obligations.

41. However, Gas-A-Mat undertook further obligations and began serving in an additional capacity than that of retail gasoline sales.

42. Gas-A-Mat undertook to provide security from violent acts or theft by third persons.

43. These acts consisted of the provision of cashiers booths, signs alerting individuals that the premises were secured (although they were not) and other measures to protect the security of any individual entering onto the premises including employees of Gas-A-Mat's retail gasoline

sales operation. (For the purposes of distinguishing the two capacities, the retail sales will be referred to as "Gas-A-Mat Sales" and the security operation will be referred to as "Gas-A-Mat Security").

44. Gas-A-Mat Security was aware that the Gas-A-Mat Sales installations were particularly subject to armed theft.

45. This was due to the nature of their business and the fact that convenience outlets of all kinds are noted as high risk situations.

46. The retail sales installation at which Maurine Hunsaker had been employed had been robbed at least twice previous to the abduction of Maurine Hunsaker on February 23rd, 1986.

47. Due to the high risk nature of the Gas-A-Mat Sales operation, Gas-A-Mat Security had a duty to inform Gas-A-Mat Sales as to improvements to be made in security at said installation.

48. Some of these recommendations should have been but were not limited to: a locked, bullet-resistant cashier's booth where employees could be protected from armed assailants, employee training to prevent situations whereby innocent third parties could be injured as a result of an attempted theft or robbery, an adequate alarm system whereby an employee could signal the local authorities or Gas-A-Mat Security to assist them in a robbery or theft situation, reasonable shift work and times so that employees would not be

left alone for long periods of time, and adequate surveillence on a random basis either by Gas-A-Mat Security or local police officers.

49. Gas-A-Mat Security failed to provide these recommendations to Gas-A-Mat Sales and as a result, none of said recommendations were implemented.

50. The design of the cashier's booth was faulty in that it required an employee to leave the booth to obtain payment from the customers. It also had no bullet resistant features.

51. Gas-A-Mat Security had a duty and an obligation to inform Gas-A-Mat Sales of the deficiencies in its operation.

52. Gas-A-Mat Security failed to so inform Gas-A-Mat Sales and, as a proximate result, the decedent Maurine Hunsaker was abducted by the defendant Ralph Leroy Menzies and John Does I-V on the 23rd day of February, 1986.

COUNT ONE

53. Plaintiff realleges and incorporates by this reference herein the allegations contained in paragraphs 1 through 52 above.

54. On or about the 23rd day of February, 1986 the defendant Menzies and John Does 1-V did drive into the Gas-A-Mat operation where the decedent Maurine Hunsaker was employed.

55. That shortly after arriving, the defendants

Menzies and John Does I-V forcibly abducted the decedent Maurine Hunsaker from the premises.

56. At some point thereafter, the defendants Menzies and Does I-V did require the decedent to contact her husband, plaintiff Jim Hunsaker, by telephone.

57. In that conversation, the decedent informed the plaintiff that "they" were holding her but that she was all right.

58. That at some time subsequent to that conversation but prior to February 25, 1986, the defendants Menzies and Does took the decedent to Storm Mountain, Big Cottonwood Canyon, Salt Lake County, State of Utah.

59. At that location the defendants Menzies and Does did willfully inflict injuries upon the decedent Maurine Hunsaker thereby causing her death.

60. These actions were willful, malicious and with full intent to cause the death of Maurine Hunsaker.

61. Therefore, the plaintiffs have been injured and the defendants Richard Menzies and John Does I-V are liable to the plaintiffs in a sum to be adduced at trial for compensatory and punitive damages.

COUNT TWO

62. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 61 above.

63. That at the Parole Board hearing prior to the

October 9, 1984 release of the defendant Menzies, the defendant Board had before it the records of Menzies' convictions and sentences.

64. That the defendant Board was only required to apply its written policy and guidelines for release of prospective parolees to Menzies' criminal record and sentences.

65. That said Board failed to properly apply said guidelines and in doing so, released a dangerous individual into the community at least four years earlier than guidelines indicated.

66. That as a result of this release, the defendant Menzies and John Does I-V did abduct the decedent Maurine Hunsaker and did intentionally and willfully cause her death.

67. As a result, the plaintiffs have been injured, and the defendant State of Utah and the defendant Board are liable to the plaintiffs for damages in a sum to be adduced at trial.

COUNT THREE

68. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 67 above.

69. The defendant Menzies was ordered to report to the defendant Shepard as one of the terms and conditions of his parole.

70. The defendant Shepard in his official capacity

as a parole officer under the direction of the Department of Adult Probation and Parole was charged with the duty of supervising the parole of Ralph Leroy Menzies.

71. Defendant Gary DeLand as director of Utah State Department of Corrections, the Utah State Department of Adult Probation and Parole (AP&P), Myron March as Director of AP&P, Ray Wall as the Regional Supervision of AP&P, and Kent Jones and Joe Smout as supervisors of John Shepard were also charged with the duty of seeing that Menzies' parole was properly supervised.

72. The terms and conditions of Menzies' parole had already been established and required no policy decisions upon the part of the above-named defendants.

73. The only actions required of the above-named defendants were to see that Menzies' actions conformed with those requirements already set by policy and the terms of Menzies' parole.

74. The above-named defendants failed to properly supervise Menzies' parole and failed to take the steps necessary to violate said parole due to Menzies violation of the agreements.

75. As a result, the above-named defendants were negligent in their supervision of the defendant John Shepard, and the defendant John Shepard was negligent in his supervision of the defendant Menzies.

76. Therefore, the defendant Menzies, due to the

failure of supervision, was able to abduct the decedent Maurine Hunsaker and cause her death.

77. Therefore, the plaintiffs have been injured and the above-named defendants are liable to the plaintiffs in a sum to be adduced at trial.

COUNT FOUR

78. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 77 above.

79. As an employee of Gas-A-Mat, the decedent Maurine Hunsaker owed duties and obligations to Gas-A-Mat who also owed duties and obligations to Maurine Hunsaker.

80. The defendant Gas-A-Mat did act in the dual capacity in its dealings with its retail gasoline operation.

81. The defendant Gas-A-Mat assumed its own security protection, and therefore was acting in a separate capacity than that of an employer of a cashier Maurine Hunsaker.

82. Therefore, by acting in a dual capacity, the defendant Gas-A-Mat is not protected by the Workmen's Compensation Statutes of the State of Utah.

83. Gas-A-Mat owed a duty to its employees and to any other persons entering upon the premises to reasonably protect them from harm from third parties.

84. Customers and employees not involved with the security of Gas-A-Mat should be treated as business invitees

of the defendant Gas-A-Mat.

85. The defendant Gas-A-Mat breached its duty to third persons by its failure to take appropriate security precautions as outlined above.

86. Due directly to this failure to take necessary security precautions, the defendants Menzies and Does I-V were able to abduct the decedent and cause her death.

87. As a result of this breach of duty, the plaintiffs have been injured and the defendant Gas-A-Mat is liable to the plaintiffs for damages in a sum to be adduced at trial.

WHEREFORE, plaintiffs pray:

1. As to Count One, for a judgment against the defendants Menzies and Does 1-V for compensatory and punitive damages in a sum to be adduced at trial.

2. As to Count Two, for judgment against defendants State of Utah and Board of Pardons and Parole for damages in a sum to be adduced at trial.

3. As to Count Three, for judgment against the defendants State of Utah, Gary Deland as director of the Utah State Department of Corrections, Utah State Department of Corrections, Myron March as director of the Utah State Department of Adult Probation and Parole, Ray Wall, as the Regional Supervisor of Region III of the Utah State Department of Adult Probation and Parole, Kent Jones and Joe Smout, as supervisors of John Shephard, John Shephard, in his capacity

as parole officer, and the Utah State Department of Adult Probation and Parole for damages in a sum to be adduced at trial.

4. As to Count Four, for judgment against the defendant Gas-A-Mat Oil Corp of Colorado, Inc. for damages in a sum to be adduced at trial.

5. For attorney's fees and costs.

6. For such other and further relief as the court deems just.

DATED this 16th day of June, 1987.

P. Gary Ferrero

Richard C. Hutchison

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